

LEO M. SELLING, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Behrens.*

Q. Mr. Selling, what is your occupation? A. I am an official in charge of the 100 Park Row branch of the Manufacturers Trust Company.

Q. Do you know this defendant, Murray R. Spies? A. I have met the gentleman.

Q. Do you recall about when you first met him? A. Several years ago through the intercession of a gentleman by the name of Lester Einstein.

161 Q. Did you have a business transaction on behalf of your bank with Mr. Spies? A. Yes.

Q. What was the transaction? A. A loan against an insurance policy.

Mr. Behrens: I would like to have this marked for identification.

(Marked Government's Exhibit 19 for Identification.)

Q. I show you Government's Exhibit 19 for Identification and ask you what that is, Mr. Selling? A. This is the record of the loan made to Mr. Murray R. Spies of 33 Lewis Place, Rockville Center; New York address 40 Exchange Place; on July 1st we made a loan of \$12,500 at the rate of 4½ percent. It was due on September 23.

The Court: What year?

The Witness: It was September 23.

Q. Of what year? A. It is 1937.

Q. Can you tell us in connection with that loan of \$12,500 on July 1st, 1937, what, if any, collateral the bank got in

connection with the loan? A. The assignment of his equity in an insurance policy.

Q. Do you have any records from which you could tell us the exact amount of the collateral? A. Yes.

Mr. Behrens: May I have this marked for identification?

(Marked Government's Exhibit 20 for Identification.)

Mr. Behrens: Mark this for identification.

(Marked Government's Exhibit 21 for Identification.)

Q. I show you Government's Exhibit 20 for Identification and I ask you if that exhibit will tell us what collateral was put up? A. Life Assurance Society of New York—the Equitable Life Assurance Company, a \$25,000 policy, the value of which at that time was \$22,691.50.

Q. Would you say that that so-called policy was an annuity policy which had been paid up? A. That I do not know, how it was arrived at. It was a policy of value—

Mr. Cahill: We will concede that it was an annuity policy.

Mr. Behrens: Thank you.

Q. One other thing: Can you tell from your records whether there were any liens against that policy at the time you got it? A. No, there were no liens.

Q. Do you have any recollection of the details surrounding the assignment of that annuity to you? A. As near as I can recall the policy was given to me. There was some provision, I think, at the time relative to a provision made for the children.

Q. Yes? A. And that I believe was changed and the proceeds in the event of death were to go to Mrs. Spies.



Q. Yes. A. To which was agreed and signed a waiver in favor of the bank in the event of non-payment of the loan. This policy was then taken and sent to our investigating department and they investigated and sent it back to me. It was all clean for me to go ahead with the loan which I made. At the time I think the original was twelve-five, and it was increased to seventeen, and then four thousand dollars more was made, and then it grew up to twenty-two thousand seven hundred.

On August 5, 1938, I believe it was owing and I think it never was paid and we sold the policy back to the insurance company and collected our fees and we credited 167 \$718.98 to the commercial account of Murray Spies, which was the amount in excess of our loan, which we collected and returned.

Q. And I understand it, the record indicates that this loan was made on July 1, 1937, as a first loan? A. Correct.

Q. From that time could you tell me about how long it would take in the regular banking routine with that in mind, how long it would take, about, after this matter was first brought to your attention? A. It usually takes from a week to ten days to straighten that out.

Mr. Behrens: I offer Government's Exhibits 19 and 20 for Identification in evidence (handing Mr. Cahill).

Mr. Cahill: No objection to these exhibits.

(Government's Exhibits 19 and 20 for Identification now received in evidence.)

Mr. Behrens: I notice that there seem to be photostatic copies of Government's Exhibits 19 and 20 now in evidence. I am wondering if we might be able to substitute the copies so he can return the originals to the bank?

Mr. Cahill: If you have compared them and they are true copies, that is all right.

*Leo M. Selling—For Government—Cross.*  
*John H. Reighley—For Government—Direct.*

The Court: Without objection.

Mr. Behrens: You may inquire, Mr. Cahill.

*Cross-examination by Mr. Cahill.*

Q. Mr. Selling, just as a matter of clarifying the situation: This Exhibit 19 is a list of the loans made to Mr. Spies, is it not? A. Yes.

Q. \$12,500 on the 1st of July? A. Against the policy. That was the first loan.

Q. At the end of December, 1937, what did the loan reach? A. He owed us \$22,700.

Q. Did you ask him to pay the loans before the annuity policy was sold or cashed in? A. At the last we did, yes, because he did not have sufficient money to pay his interest at the time, and we asked him to come in and see us and if it was agreeable for us to collect our money from the insurance company.

Q. Were you the ones who sold the annuity policy? A. The company did, yes.

Q. That was after the conversation with Mr. Spies? A. Yes.

Mr. Cahill: That is all.

(Witness excused.)

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JOHN H. REIGHLEY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Behrens.*

Q. Mr. Reighley, what is your occupation? A. Internal Revenue Agent.

Q. How long have you been in the government service? A. Since January, 1919, in the Treasury Department.

Q. Do you know this defendant, Murray R. Spies? A. I do.

Q. Do you recall approximately when it was that you first met him? A. April 5, 1939.

Q. Where did you meet him? A. At 40 Exchange Place.

Q. Did you have a conversation with him at that time? A. Yes, I did.

Q. Will you tell us what the substance of it was? A. I called on Mr. Spies to make an examination of his income tax for 1936. I asked him for his retained copies, which he said he did not have, and he admitted the filing of no return for 1936.

Q. Did you have a farther conversation with him in view of what you told him? A. Yes, I asked him for his records, and he did not have the records at that time. He said he would get them. I called him a day or two later, and he left a note for me that he was sick, as I recall, and his records were not in very good condition and asked if I would wait for another week, which I did.

Q. At that first meeting with Mr. Spies do you recall anything at all about Form 60? A. At my first meeting I asked Mr. Spies to fill out the Form 60, which is the form designed to show bank accounts and other assets and earnings by the taxpayer. Mr. Spies did this and submitted it at that time.

Mr. Behrens: These exhibits are upstairs. We will have them down here in a moment.

The Court: He filled that out while you were there?

The Witness: He did, and I witnessed the signature.

Q. Did you have any talk with Mr. Spies at that time about filing an income tax return in the future? A. Mr. Spies said he intended to file a return and he was going down to get a form to fill out.

Q. Did you say anything to him about that? A. Yes, I told him the dates of it—I also told him that he could get

the form on the sixth floor and I told him that any anticipating of my report would not mitigate the penalties, remit the penalties, rather.

Q. What was your answer to the defendant? A. I told him that it would not change the penalty feature of the case at all.

Q. You were discussing what penalties? A. It would not relieve him of the penalty by anticipating my report.

Q. Will you tell us what penalties there were that you discussed? A. That was a delinquency penalty of 25 percent and a penalty of 50 percent fraud penalty.

Q. At any time did you finally get some records—just a minute, please.

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The Court: Is that question withdrawn?

Mr. Behrens: Yes. May I have this Form 60 marked for identification?

(Marked Government's Exhibit 21 for Identification.)

Q. I show you Government's Exhibit 21 for Identification and ask you what that is? A. That is our Form 60.

Q. Is that the form that was filled out and signed by the defendant in your presence on April 5, 1939? A. It is.

Q. Did he swear to that in front of you? A. Yes, he signed it in front of me.

Q. Did you swear the defendant to it? A. I did.

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Mr. Behrens: I offer Government's Exhibit 21 for Identification in evidence.

Mr. Cahill: No objection.

The Court: Received in evidence.

(Government's Exhibit 21 for Identification received in evidence.)

Q. Some time after this meeting with the defendant, Mr. Reighley, did he turn over some records to you? A. Yes, after this meeting Mr. Spies turned over some records to me. He turned over a check-book on the First Mutual Corporation.

Mr. Behrens: Just a minute. May I have this checkbook marked for identification.

(Marked Government's Exhibit 22 for Identification.)

Q. Is Government's Exhibit 22 the checkbook to which  
179 you have just referred? A. Yes, that is the one.

Q. What else did he turn over to you at the time? A. He turned over a stub book on the Murray R. Spies Special Account at the Manufacturers Trust Company.

Mr. Behrens: May I have this checkbook marked for identification.

(Marked Government's Exhibit 23 for Identification.)

Q. I show you Government's Exhibit 23 for Identification and ask you is that the checkbook to which you have just referred? A. Yes, that is the checkbook.

Q. What else did he turn over to you at that time, Mr. Reighley? A. He turned over a stub book of Marie V.  
180 Spies in the Lynbrook Bank & Trust Company.

Q. Did you retain that? A. No, I returned that to him later on. There was no writing in the stub book or any legible entry so that I could use it.

Mr. Cahill: The book is not here?

The Witness: That was returned to Mr. Spies.

Mr. Cahill: I object to the characterization. I do not know what is in it. It is a conclusion that it was



not legible to his mind. He might ask him if he could read it. I do not think it should be characterized.

The Court: The jury will disregard that part of it.

Q. Will you tell us with respect to what this checkbook which you returned to him was, whether there were any instances where there was any notation in the checkbook with respect to the purposes for which the check was drawn or the amount of the check? A. Yes.

Q. There were such instances? A. Yes.

Mr. Cahill: The witness has testified the book was returned to the defendant?

Mr. Behrens: The book that was turned over to him by Mr. Spies the witness has said it was a checkbook of the Marie V. Spies account in the Bank of Rockville Centre.

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The Court: The witness has it no longer in his possession and has given it back to the defendant. That is my understanding.

The Witness: That is correct.

Mr. Cahill: I object to putting in evidence anything relating to the contents of Mrs. Spies' checkbook or stubs or anything which it might contain.

Mr. Behrens: That was a record turned over to him. I am not trying to show what the records show.

The Court: Overruled.

Mr. Cahill: Exception.

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Q. In addition to these checkbooks, Mr. Reighley, did the defendant turn over certain checks to you? A. Yes, he did.

Q. Do you recall what checks those were? A. Those were all the Marie V. Spies regular account at the Bank of Rockville Centre Trust Company, the Corn Exchange Bank and the Lynbrook National Bank & Trust Company.

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*John H. Reighley—For Government—Direct.*

Mr. Behrens: May I have this book of checks marked for identification?

(Marked Government's Exhibit 24 for Identification.)

Mr. Cahill: What is Exhibit 23?

The Clerk: The checkbook.

The Court: The checkbook on the special account.

Q. I show you Government's Exhibit 24 for Identification and I ask you whether those are the checks on the Lynbrook National Bank of Mrs. Spies turned over to you? A. Yes, those are on the Lynbrook National Bank and Trust Company.

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Mr. Behrens: May I have this group of checks also marked for identification.

(Marked Government's Exhibit 25 for Identification.)

Q. I show you Government's Exhibit 25 for Identification and I ask you whether those are the checks which Mr. Spies turned over to you on the Bank of Rockville Centre? A. Yes, those are the Rockville Centre Trust Company checks.

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Mr. Behrens: May I have a group of checks marked for identification.

(Marked Government's Exhibit 26 for Identification.)

The Witness: That is the Bank of Rockville Centre Trust Company.

Q. I show you Government's Exhibit 26 for Identification and ask you whether those are the checks on the Corn

Exchange Bank which Mr. Spies turned over to you? A. Yes, those are the checks.

Q. In addition to the checkbooks and the checks which you have identified as having been turned over to you by Mr. Spies, did he give you anything else at that time? A. No, he did not give me anything else.

Q. Perhaps I can refresh your recollection, Mr. Reighley. A. Oh, yes, he did give me some bank statements on this same group of accounts.

Q. In other words, where you have the checks which Mr. Spies turned over, you have some bank statements also? A. Yes, I do. They were in these envelopes.

Mr. Behrens: May I have these bank statements marked separately for identification. 188

(Marked Government's Exhibits 27, 28 and 29 for Identification.)

Q. I show you Government's Exhibit 27 for Identification, on the Bank of Rockville Centre; Government's Exhibit 28 for Identification, on the Corn Exchange Bank Trust Company; Government's Exhibit 29 for Identification, on the Rockville Centre National Bank & Trust Company. I show you Government's Exhibits 27, 28 and 29 for Identification and I ask you whether those were turned over to you by Mr. Spies? A. Yes, they were.

Q. Are those the only records Mr. Spies turned over to you, namely, starting with these two checkbooks and these checks are the three exhibits that have just been marked, which are the bank statements, does that complete and include all the records that Mr. Spies ever gave you? A. Yes, the bank records. 189

The Court: Except the stub book which you returned?

The Witness: Yes.

Mr. Behrens: I offer Government Exhibits 22 to 29 for Identification, inclusive, in evidence.

Mr. Cahill: 22 to 29?

Mr. Behrens: Yes.

Mr. Cahill: Is 22 the only book record of Mrs. Spies that was turned over to him?

Mr. Behrens: 22?

Mr. Cahill: Yes.

Mr. Behrens: They are practically all accounts carried in the name of Marie V. Spies.

Mr. Cahill: Is that the only checkbook of Mrs. Spies that was offered?

Mr. Behrens: Checkbook No. 22 is not a checkbook of Mrs. Spies. It is a checkbook of the First Mutual Corporation at the Marine Midland Company.

Mr. Cahill: Is the checkbook of Mrs. Spies in?

Mr. Behrens: No, it is not.

Mr. Cahill: I object to them, if your Honor please. If they are offered for the limited purpose, I would have no objection. But I do object to the offer of these checkbooks, check, bank accounts, without the limitation against the defendant Spies. They are being offered to show the fact that he turned them over so the Government might get additional information out of them. It would not indicate that he was personally responsible either for the entries or lack of proper entries or whatever may be found in them.

I think that they are both irrelevant and incompetent on that point. I do not know the purpose, if the purpose is not limited.

Mr. Behrens: The primary purpose of offering the records is to show the type of records kept by the defendant and to form a basis of an attempt to analyze the various bank deposits which were made during the three years.

Mr. Cahill: It does not appear that he made them.

Mr. Behrens: The defendant could not have made these bank statements that are furnished. I do not know whether that is the issue on that at all. Yes, it is given to show the control over the accounts and to show that he had an interest in the account, that is different.

The Court: Let me know one thing, sir: These records, Mr. Witness, were they turned over to you in response to the request by you for records which would reflect the defendant's income and expenses to provide the information necessary for the establishment of a return?

The Witness: That is right, yes, sir.

Mr. Cahill: May I ask one preliminary question?

*By Mr. Cahill.*

Q. Did the defendant tell you whether he kept these books himself? I am not speaking of the bank statements. Did he tell you whether he wrote the checks or kept the records and the stubs? A. I do not recall that he did. I do not think I asked him that. I do not think he told me that at the time.

The Court: I will allow them.

Mr. Cahill: I respectfully except.

(Government's Exhibits 22 to 29 for Identification, inclusive, received in evidence.)

*By Mr. Behrens.*

Q. Mr. Reighley, do you recall that some time after you had gotten these books and records, which are Government's Exhibits 22 to 29 in evidence, having any conference with this defendant Spies? A. Why, we had a conference with Mr. Spies on April—two conferences, April 22 and April 27, 1940, Special Agent Deneen and myself.



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*John H. Reighley—For Government—Direct.*

Q. Was that in April, 1940? A. April 22—April 22—  
I better check up on that. Yes, April 22, 1940.

The Court: And the second conference was when?

The Witness: April 27, 1940.

The Court: We will now take a recess to 2.30. I  
have some other business. The Court will adjourn  
until 2 o'clock.

(Recess until 2.30 P. M.)

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AFTERNOON SESSION.

JOHN H. REIGHLEY resumed the stand.

*Direct examination (continued) by Mr. Behrens.*

Mr. Cahill: Your Honor, there is a situation that  
I have to speak about which ought not be put on the  
record.

(Discussion at the bench, off the record.)

Q. Mr. Reighley, before we adjourned for lunch I believe  
you told us that on two occasions in April, 1940, you and  
Mr. Deneen had a conference with Mr. Spies, is that cor-  
rect? A. We did.

198 Q. Where did those conferences take place? A. At our  
office over in the Federal Building.

Q. Will you speak up a little louder. A. Over at our  
office in the Federal Building; once in 1115G in the Internal  
Revenue Tax office and once in our office, Room 813.

Q. In any event, both of the conferences were at 90  
Church Street here in the City? A. That is correct.

Q. At those conferences did you and Mr. Deneen ask  
Mr. Spies any questions with reference to who his depend-  
ents may have been during 1936? A. Yes, we did.

Q. What answer did he give you? A. None other than having a wife and children.

Q. How many children did he tell you he had? A. Two children.

Q. You are referring to the year 1936? A. 1936.

Q. Did he say that his wife and two children were his only dependents during that year? A. Yes.

Q. Did you question him with reference to the places where he lived during the year 1936? A. Yes, we did.

Q. What did he tell you? A. From November, 1934, to October, 1936, he lived at 1 Marion Place, Rockville Centre; from November, 1936, to November, 1937, at 135 Eastern Parkway.

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Q. Brooklyn? A. Brooklyn.

Q. Can you tell us in what collection district those two numbers are? A. In the First Collection District.

Q. At those two conferences did you and Mr. Deneen ask Mr. Spies where his place of business was during the year 1936? A. We did.

Q. What did he tell you? A. From 1935 until August, 1939, he was at 40 Exchange Place, New York.

Q. What collection district is that address, 40 Exchange Place, in? A. In the Second Collection District.

Q. During the course of these two conferences did you exhibit to Mr. Spies a so-called voting trust agreement? A. Yes, he exhibited a photostatic copy of a voting trust agreement of Universal Shares.

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Mr. Behrens: May I have this marked for identification, purporting to be a voting trust agreement with respect to Universal Shares, Ltd.

(Marked Government's Exhibit 30 for Identification.)

Q. I show you Government's Exhibit 30 for Identification and ask you whether that is a photostatic copy that

you had in your conference with Mr. Spies during your interrogation of him in April, 1940? A. Yes, that is the copy of the agreement.

Q. What did he say with reference to that agreement? Did you show him the signatures? A. Yes, we showed him a signature.

Q. Did he identify it? A. He identified his signature.

Q. Will you tell us what the date of that agreement is?

A. The agreement was dated November 15, 1933.

Mr. Behrens: I offer Government's Exhibit 30 for Identification in evidence (handing to Mr. Cahill).

The Court: For the purpose of showing the fact that that income was admitted at the time?

Mr. Behrens: Yes.

The Court: Not for the purpose of the truth of any statements that were made?

Mr. Behrens: No. It is the agreement under which Mr. Spies received the \$40,000.

The Court: Very well.

Mr. Cahill: There is no issue, if your Honor please, here as to the receipt of the \$40,000 which has been expressly conceded. I think the terms of the trust agreement will be merely encumbering the record.

The Court: There may be some question as to whether the \$40,000 was income or return on capital or something else. I think the agreement is pertinent to show it was income. I will take it for that purpose.

Mr. Cahill: We will concede that it was. This will throw no light on that subject.

Mr. Behrens: I feel that it is necessary to have it in evidence in order for the witness to explain properly Mr. Spies' version of why he got the \$40,000.

Mr. Cahill: That, I think, is immaterial. If he got it as income, that is the sole question with which we are concerned now.

The Court: It is competent and relevant, and the only objection that you can have is that you conceded possibly, all of it, but surely there are some facts which will arise concerning it. I think I will allow it.

Mr. Cahill: I object to it on the ground of irrelevancy.

(Government's Exhibit 30 for Identification received in evidence.)

Q. During the interrogations or conferences which you and Mr. Deneen had with Mr. Spies in April, 1939, did you ask him any questions with reference to his receiving \$40,000 on June 11, 1936? A. Yes, we did.

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Q. What did he say about the receipt of that money? It is pointed out that that meeting was not in April, 1939, but it should be 1940. A. May I have that question again?

Q. (Question read.) A. He said that he received that money for resigning as voting trustee of Universal Shares and that that was for profits and additional interests he had in the associated companies, including the cancellation of his salary contracts.

Q. Did he tell you that he had salary contracts with two of these companies? A. Yes, with the United Sponsors and the United Standard Oil Shares.

Q. Did he say that in addition to that he had some other agreement with the companies as to commissions? A. Yes, there was an agreement with respect to commissions, too.

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Q. This \$40,000, am I correct, was not payment for his resignation as voting trustee but for the cancellation of his employment contract and this commission contract? A. That is correct.

The Court: You have not told me the name of the company of which Exhibit 30 is the voting trust.

Mr. Behrens: That is the Universal Shares, Limited.

Q. Will you give us again the names of the two companies with which he had these employment contracts? A. United Sponsors, Inc., and United Standard Oil Shares, Inc.

Q. Did you ask him whether he had any individual interest in these Universal Shares or United Sponsors or in the United Standard Oil Shares corporations? A. Yes.

Mr. Cahill: I object to that as irrelevant. We are getting far afield.

The Court: Will the reporter read the question?

(Question read.)

The Court: I will sustain the objection. I do not see the relevancy of whether he did own it or did not. He said the money was not received for any of that stock. You may ask him that question again, if you like. I think it was clear.

Mr. Behrens: I think that in the absence of an individual interest in the companies, I submit that it was income.

The Court: The presence of it would not necessarily prove the contrary. I cannot assume the answer. When you put the question, I excluded it. But you may, if you wish, ask a question that will clear up what his answer was in reference to your preceding question, if the money was not received for such capital interest—

Mr. Cahill: I think the purpose was answered fully by Mr. Reighley.

The Court: It is up to Mr. Behrens.

Mr. Behrens: I feel that I have pressed the matter far enough.

Q. Mr. Reighley, did you ask Mr. Spies, the defendant, any questions about how he had received this \$40,000? A. Oh, yes, we did.



Q. What did he tell you? A. He said he received the \$40,000 in cash at the Lawyers Trust Company. And he also said that Mr. Robert Weinstein was present and a representative of Mr. Eddy. The money was paid in cash, the \$40,000, and \$2,000 was given for Mr. Eddy, and the balance was transported to the Lynbrook National Bank & Trust Company.

Q. Did he tell you why he gave \$2,000 to Mr. Eddy? A. Yes, he gave that to Mr. Eddy on his agreement to repay him if he ever got any bonuses from any of the associated companies or any of these companies.

Q. You say if he ever got any bonuses he was to repay whom? A. Mr. Eddy.

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Q. During the course of your conferences with Mr. Spies in April, 1940, did you show him a photostatic copy of this contract of June 10, 1936, between Donald P. Kenyon and the Weil Management Company and Murray R. Spies? A. Yes, he identified a copy as being the contract.

Q. I show you Government's Exhibit 1 in evidence, and ask you if that is a photostatic copy which Mr. Spies identified on that occasion? A. Yes, it is.

Q. Mr. Reighley, after Mr. Spies had turned over these various records to you which you have previously identified, did you study and make an analysis of these various bank accounts for the year 1936? A. Yes, we did.

Q. In connection with your analysis did you obtain various transcripts of bank accounts and brokerage accounts? A. Yes, we obtained those from the banks and brokerage offices.

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Mr. Behrens: I should like to have marked for identification various of these transcripts. Perhaps I could read them off as they are marked for identification and explain what they are.

The Court: They may be so marked. You have no objection to that?

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*John H. Reighley—For Government—Direct.*

Mr. Cahill: I do not know what they are.

The Court: You have no objection to counsel identifying them instead of asking the witness to identify them?

Mr. Cahill: No.

(Marked Government's Exhibit 31 for Identification.)

Mr. Behrens: 31 for Identification is a photostatic copy of the ledger account in the name of Murray Robert Spies at the Bank of Rockville Centre Trust Company.

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(Document marked Government's Exhibit 32 for Identification.)

Mr. Behrens: Exhibit 32 for Identification is a transcript of Marie V. Spies, in trust for Murray Robert Spies, Jr., account No. 17837, Bank of Rockville Centre Trust Company.

(Document marked Government's Exhibit 33 for Identification.)

Mr. Behrens: Government's Exhibit 33 for Identification is a copy of an account in the name of Marie V. Spies at the Bank of Rockville Centre Trust Company.

(Document marked Government's Exhibit 34 for Identification.)

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Mr. Behrens: Government's Exhibit 34 for Identification is a transcript, a certified transcript, of the account of Marie V. Spies, in trust for Barry Spies, account No. 19494, at the Lynbrook National Bank & Trust Company.

(Document marked Government's Exhibit 35 for Identification.)

Mr. Behrens: Government's Exhibit 35 for Identification is a transcript of account No. 19336 in the name of Marie V. Spies.

The Court: Has Marie V. Spies been identified?

Mr. Behrens: No. I will do that immediately, your Honor.

The Court: What bank?

Mr. Behrens: It is the same bank, Lynbrook National Bank & Trust Company.

Mr. Cahill: That is not in trust for anybody?

Mr. Behrens: No, just Marie V. Spies at the same bank.

(Document marked Government's Exhibit 36 for Identification.) 218

Mr. Behrens: Government's Exhibit 36 for Identification is account No. 14189, Marie V. Spies, in trust for Murray R. Spies, Jr.

(Document marked Government's Exhibit 36-A for Identification.)

Mr. Behrens: The next one is marked Government's Exhibit 36-A for Identification and is an account in the name of Marie V. Spies, apparently a checking account, in the Lynbrook National Bank & Trust Company.

Mr. Cahill: Those are all transcripts?

Mr. Behrens: Yes, these are all transcripts.

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(Document marked Government's Exhibit 37 for Identification:)

Mr. Behrens: Government's Exhibit 37 for Identification is an account of Marie V. Spies, in trust for Barry Spies, account No. 10473 in the Nassau County National Bank of Rockville Centre.

(Document marked Government's Exhibit 37-A for Identification.)

Mr. Behrens: Government's Exhibit 37-A for Identification is a transcript of both accounts at the Nassau County National Bank. It covers account No. 10472 of Marie V. Spies, in trust for Murray Robert Spies, Jr., and account No. 10473, Marie V. Spies, in trust for Barry Curtis Spies. This is at the Nassau County National Bank.

(Document marked Government's Exhibit 38 for Identification.)

Mr. Behrens: Government's Exhibit 38 for Identification is a transcript of Mrs. Marie V. Spies' account at the Corn Exchange Bank Trust Company.

(Document marked Government's Exhibit 39 for Identification.)

Mr. Behrens: Government's Exhibit 39 for Identification is a transcript of the account of Murray R. Spies, Special, at the Underwriters Trust Company.

(Document marked Government's Exhibit 40 for Identification.)

Mr. Behrens: Government's Exhibit 40 for Identification is a transcript of a brokerage account in the name of Marie V. Spies at Edward B. Smith & Company.

(Document marked Government's Exhibit 41 for Identification.)

Mr. Behrens: Government's Exhibit 41 for Identification is a transcript of an account with the same company in the name of Mr. Raymond W. Powers.

(Document marked Government's Exhibit 42 for Identification.)

Mr. Behrens: Government's Exhibit 42 for Identification is a transcript of an account in the name of Mrs. Marie V. Spies with Kohler, Fish & Company.

(Document marked Government's Exhibit 43 for Identification.)

Mr. Behrens: Government's Exhibit 43 for Identification is a transcript of a stock account in the name of Mrs. Marie V. Spies in Fuller, Rodney & Company.

(Document marked Government's Exhibit 44 for Identification.)

Mr. Behrens: Government's Exhibit 44 for Identification is a transcript of an account in the name of Murray R. Spies with the Manufacturers Trust Company.

(Document marked Government's Exhibit 45 for Identification.) 224

Mr. Behrens: Government's Exhibit 45 for Identification is a photostatic copy of an account in the name of Marie V. Spies, in trust for Barry Curtis Spies, in the South Shore Trust Company, Rockville Centre.

(Document marked Government's Exhibit 46 for Identification.)

Mr. Behrens: Exhibit 46 for Identification is a photostatic copy of an account in the name of Marie V. Spies, in trust for Murray Robert Spies, also in the South Shore Trust Company, Rockville Centre.

Mr. Cahill: Is that Murray Robert Senior or Junior?

Mr. Behrens: There is no designation after it. 225

*By Mr. Behrens.*

Q. Did you ask, Mr. Reighley, during your interrogations of Mr. Spies who Marie V. Spies is? A. Yes.

Q. What did he say? A. Marie V. Spies is his wife.

Q. Was she his wife in 1936? A. Yes, they were married June 23, 1922.



Q. Did you ask him who Mr. Raymond W. Powers was?

A. Yes, I did.

Q. What did he say about Mr. Powers? A. Mr. Powers is his brother-in-law.

Q. With reference to these accounts in the name of Marie V. Spies, did you ask him what, if any, connection he had with the accounts? A. He stated with respect to the income of Mrs. Spies and deposits, and so forth, that all of her source of income was either from the United Sponsors or the United Standard Oil shares and his salary.

Q. Did you also ask him who it was that had actual control over those various accounts? A. Yes, we did.

227 Q. Do you recall what he said with reference to that? A. I do not recall his exact language with reference to that.

Q. What was the substance of the conversation? A. The substance of it was that he really had control of the whole thing.

The Court: You say "the whole thing." Do you include the account in the name of Mrs. Spies and also accounts in Nassau County?

The Witness: I include the accounts, all of the accounts mentioned heretofore, except the corporate accounts.

228 Q. You have mentioned the corporate accounts that were in the name of Murray R. Spies, Marie V. Spies, individually or in trust for various people? A. That is correct.

Q. And also Mr. Powers? A. Yes.

Q. Will you tell us what he said with respect, if anything, to the stock account of Mr. Powers, whether he had anything to do with that? A. Mr. Powers really did not have anything to do with the control of the account. Mr. Spies had control of that account altogether.

Mr. Behrens: I would like to offer Government's Exhibits 31 to 46 for Identification in evidence (handing to Mr. Cahill).

The Court: When a document is offered for identification it is not yet any paper for you to consider. It is simply a convenient way of attaching a label, a number, to a paper, so that we do not confuse it in the stenographic report. If the reporter has marked it and when the document is received in evidence, it then becomes a paper that you may then, the jury, consider.

I want to caution you not to be the slightest bit concerned when I rule on questions of fact. If I make a mistake the Circuit Court will correct me. You should not be the slightest bit disturbed about it. You just consider evidence that I admit and the answers to questions that I allow. As to the others, do not draw any inference from the questions left unanswered because I have sustained the objection. Just dismiss them from your consideration altogether.

230

Mr. Cahill: If your Honor please, I object to these as irrelevant for the reasons already stated. The issue as to the income has been largely removed; and also for this reason: in the present stage, while this may be income, we do not know; there is no proof either to establish their accuracy or to show any connection on the part of the Spieses with them that would have anything to do with the issues in this case. I do not want to compel the Government to bring any bank tellers here.

231

The Court: You are not making any objection on the ground of incompetency?

Mr. Cahill: If they were obtained from that source from the bank and they were made in the regular course, I do not want to go through the motion to establish their accuracy. I will take it for granted

that they are. There does not appear to be anything on them that would throw any light on the issues here. The mere fact that he may have directed or controlled the accounts, whether brokerage or bank accounts, and it went to his wife in trust for his children or otherwise, it would have no effect on the question of his taxable income or acknowledgment of the fact that a taxable income has been set up. I mean that that is not an issue in this case. That is not a material issue in a case of this kind.

I think that it is unnecessary to pile up all of these records on us. It may be prejudicial.

233

The Court: Clearly these would be admissible in view of your concession of competency. If there had not been any concession, the concession that you made about stating a taxable income, but that concession was not adequate to meet the issues of this indictment.

Under those circumstances, I think the Government will have to prove it. In a sense, the only objection is one, of defense.

Under those conditions, I will allow them.

Mr. Cahill: The objection is one of irrelevancy. Under the circumstances, it is not merely a matter of defense. I call that to your Honor's attention in passing because the record of his income is cumbersome and it is a secondary matter.

234

The Court: I think they are relevant to the matter of the taxpayer's income. If it had not been for your concession, I do not think you would argue to the contrary. Since your concession has not adequately met all the issues, he may proceed.

Mr. Cahill: I do not concede that it contains any evidence of income at all. They are both deposits and withdrawals; I suppose more withdrawals than deposits. It cannot be assumed that these represent items of income.

The Court: I do not think that it is a concession that each item is income. I do not see how anybody can figure out income without having books and receipts of disbursements.

I will overrule your objection and grant you an exception.

Mr. Cahill: Exception.

(Government's Exhibits 31 to 46 for Identification received in evidence.)

Q. Mr. Reighley, with reference to these Exhibits 31 to 46—

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Mr. Cahill: May I suggest this: I do not want to have anything hidden as to this. I want to be quite open about it. I think that one of these exhibits, when it is examined, will be confusing. I think it was made in the year 1936. Perhaps we better be careful about the dates, too.

The Court: Does it include 1936?

Mr. Cahill: I find that it does. It includes more than that.

The Court: I will receive it. If it includes any part of 1936, I do not know how I can cut the exhibit in half. If any of them deal with years other than those in issue, I will entertain an objection with respect to it.

Mr. Cahill: I object to any items appearing on there that are not included within the year 1936.

237

The Court: I will overrule the objection relating to any exhibit which in part refers to 1936, provided it is one whole exhibit.

Mr. Behrens: Yes. We have been examining them. If any one of the exhibits relates entirely to the year 1937, I shall join in a motion to exclude it.

The Court: Very well.

Mr. Cahill: Without a detailed examination, the only thing that I can do is to take an exception.

The Court: It is my suggestion that offering so many exhibits in evidence in one bulk makes it difficult for counsel to examine each of them. I suggest that you offer them in smaller quantities so that both the Court and counsel can look at them.

Mr. Behrens: This is the end of the large quantity.

The Court: Very well.

Q. Mr. Reighley, did you make an analysis of Government's Exhibits 31 to 46 that are now in evidence? A.

239 Yes, I did.

Q. Did you add up all the deposits made in all of those accounts during the year 1936? A. Yes, I have.

Q. What was the total amount of deposits of this account in 1936? A. The total amount of deposits in all accounts for 1936 is \$99,925.14.

Mr. Cahill: May I ask, for a clarification and not for the purpose of interrupting your examination, a question here? What was the total deposits in all accounts? Does that include bank and brokerage accounts?

The Witness: Only bank accounts.

The Court: Does it involve periods other than 1936?

The Witness: Only 1936.

Mr. Behrens: My question was limited to 1936.

240

Q. Let us get this clear, Mr. Reighley: Did any of the bank accounts included in these Government's Exhibits 31 to 46—there was deposited in the year 1936 an aggregate amount of \$99,000 and some odd dollars, is that correct?

\* A. Yes, that is the aggregate deposit for the year 1936.

Q. Have you been able to check those same exhibits and find that some of these deposits are duplications or transfers of funds from one account to another account? A. Yes.



Q. What is the total amount of the \$99,000 worth of deposits that you have been able to find constitute transfer of funds and are therefore duplications? A. \$42,323.24.

Q. After excluding them, were you able to identify some of the \$99,000 worth of deposits as representing moneys received from brokerage firms? A. Yes.

Q. What was the total amount of that? A. \$3,465.98.

Q. In addition to finding out the amount of transfer of funds and the amount due from brokerage accounts, were you able to determine if a part of the \$99,000 deposit was in repayment of loans which had been made by Mr. Spies?

A. Yes. The repayment of a loan from United Sponsors, notes payable to the United Sponsors, was \$5,177.88.

242

Q. After you had deducted from the gross deposits the amount that you could charge off to transfer of funds and received from brokers and repayment of loans, what was the total amount of deposits during 1936 remaining? A. The total amount of deposits for 1936 was \$48,958.04.

Q. After you had arrived at that figure—

Mr. Cahill: May I get that amount so that I can make a note?

Mr. Behrens: It is \$48,958.04.

Mr. Cahill: Thank you.

Q. After you had gotten down to that figure, did you run it down to see whether there were any records indicating the payment of money to Mr. Spies during 1936, which payment had not been deposited? A. Yes, I did.

243

Q. What did you check in order to determine that? A. From the United Sponsors' books there were certain items that were not deposited.

Mr. Behrens: I would like to have marked for identification a general ledger of United Sponsors. Perhaps one page of that would be sufficient; marked "M. R. Spies," Mr. Cahill (handing to Mr. Cahill).



Mr. Cahill: Are you offering it in evidence?

Mr. Behrens: No. I will eventually, I think. I should probably have it marked for identification. Perhaps you prefer to have other pages also marked at the same time for identification. That is not the only one. May I therefore have this one page, "Notes Payable, M. R. Spies," marked.

The Court: Is there a page number?

Mr. Behrens: No.

(Marked Government's Exhibit 47 for Identification.)

The Court: United Sponsors?

Mr. Behrens: This is the general ledger of United Sponsors, your Honor, "Notes Payable, M. R. Spies."

Q. I show you Government's Exhibit 47 for Identification and ask you whether that is the page of the general ledger of the United Sponsors which you used? A. Yes, it is.

Mr. Cahill: Used for what purpose?

Q. Is that a page, Mr. Reighley, that you used in determining the amount of payments made to Mr. Spies? A. Yes.

Q. During 1936, which you could not find deposited in bank accounts? A. That is the notes payable—

Mr. Cahill: Just a moment. This document in itself conveys no information, and I object to it.

The Court: If you object to its competency, I will sustain it.

Mr. Cahill: I object.

The Court: Clearly this page is not self-proving.

Mr. Cahill: It is not necessary to bring a bookkeeper to prove that was on the page. More than that is required.

Mr. Behrens: I do not quite get the objection.

Mr. Cahill: My objection is that even if it be proved to be a book of the company, properly kept, the fact that notes payable are recorded on there, payable to Mr. Spies, proves nothing with respect to his income, because he may have advanced money and it was repaid.

The Court: At the present time you have an objection as to the competency of the book. I sustain the objection.

Mr. Behrens: We shall produce some officer of the company here, possibly the bookkeeper, and identify this record as being kept in the regular course of business. 248

Mr. Cahill: I will still object to it.

The Court: Then I shall rule at the proper time on any other objection that comes up.

Mr. Cahill: I am willing to concede that that is a book of the company. Apparently it is.

The Court: You are willing to concede that it is a book of United Sponsors kept in the usual course?

Mr. Cahill: Yes, I take that for granted.

Mr. Behrens: Now I offer it.

The Court: For what purpose?

Mr. Behrens: For the purpose of showing the documents which were considered by the witness in making his computation of income.

The Court: This page shows something of the business activity of this defendant during the year in question, does it not? 249

Mr. Behrens: Yes, it shows credits and the payments to him.

The Court: I will receive it. The objection is overruled.

Mr. Cahill: I respectfully except.

(Government's Exhibit 47 for Identification received in evidence.)

Q. Mr. Reighley, will you tell us what the breakdown is on these receipts from United Sponsors? A. You mean the income or all of the receipts?

Q. As to income. A. The income was \$4,343.58.

Q. Will you tell us— A. Just a second. In that connection there is \$461.52, I think, in the deposit that we just discussed in the \$99,000, so it is \$3,882.06 in addition to the \$461.52.

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Q. May I get this straight: You tell us that the gross deposits in the various bank accounts of \$99,000 and the many deductions for transfer of funds, deductions for those receipts or those deposits which can be traced to brokerage firms and also those which can be shown to be repayments of loans, you come down to \$48,000 of deposits? A. That is correct.

Q. Now you say that in addition to that there is some three thousand and some odd dollars which, according to the records, were additional payments made to Mr. Spies and not deposited, is that correct? A. That is correct.

Q. What is the total of these bank deposits plus the additional receipts not deposited? A. That is \$52,840.10.

Mr. Cahill: What is that amount?

Mr. Behrens: \$52,840.10.

252

Q. That represents, as I understand it, all of those adjustments, Mr. Reighley. You prepared a schedule, Mr. Reighley, which shows all of the deposits in all of those bank accounts during 1936 and all of the transfer of funds and all of the receipts from brokers and repayment of loans, salary and interest for the year 1936? A. Yes, shows everything that was deposited for 1936.

Q. Does it also contain an explanation as to how much of it is transfer of funds? A. It does.

Q. Does it also explain how much of it is interest? A. Yes.

Q. Does it explain how much of it is repayment of loans? A. Yes.

Q. Does it also explain how much of it constitutes receipts from brokers? A. Yes.

Q. After you have made all of those adjustments, what sum remains unexplained? A. \$10,439.52.

Mr. Behrens: I should like to have the schedule marked in evidence with the understanding, of course, that it does not constitute proof of anything but simply contains a statement which may help the jury in deciding any questions which may arise in reference to total income.

254

The Court: In other words, as a purported schedule of the evidence which the witness has given.

Mr. Behrens: Yes, your Honor, a summary which, of course, does not constitute any evidence of itself, but I think it might be helpful.

Mr. Cahill: I object to it on the ground that it is both irrelevant and incompetent, and make the point that it includes items as to which there is no basis as to their showing items of income.

The Court: But does it contain items which the witness has not testified to?

Mr. Cahill: I could not say that.

The Court: In other words, this does represent visually the testimony which the witness has just given?

255

Mr. Cahill: I presume that is so.

The Court: You are not pressing an objection that it does not do that?

Mr. Cahill: No, I am making the point that it has been clearly established that neither an accountant nor a bookkeeper has the right to make computations based on testimony which he has given.

The Court: You at least assume that if we had a blackboard up here and the witness wrote down the answers on the blackboard in the sight of the jury in order to help their recollection, and I have seen that done in many trials, you would not contend that that blackboard was offensive to a fair trial?

Mr. Cahill: I would just concede that a computation could be made by an accountant. That is well established. I am not making any point of that. But included in here are items of income which are shown by his testimony are not items of income.

The Court: That is a matter for cross-examination.

Mr. Cahill: I think it is a matter as to relevancy and competency.

The Court: I will overrule the objection and admit the book.

Mr. Cahill: Exception.

(Marked Government's Exhibit 48.)

Q. Mr. Reighley, with respect to these various brokerage accounts, transcripts of which have been identified, did you analyze those and determine whether or not there was any gain or loss during the year 1936? A. Yes, I did.

Q. Will you tell us what you found with reference to those accounts? A. I find a loss of \$1,345.07 in the Marie V. Spies' account at Kohler, Fish & Company.

\$10.31 loss in the account, in the Marie V. Spies' account, at E. B. Smith & Company.

\$175.94 of profit in the R. W. Powers' account at E. B. Smith & Company.

Indicating a net loss of \$1,107.44.

Q. There is also an item of deduction of \$126.03 for interest. Where did that figure come from, Mr. Reighley?

A. That is interest in the brokerage account which is made up of the Marie V. Spies' account at Kohler, Shear & Fish

of \$122.27; and interest of \$1.89, the interest in the R. W. Powers' account at E. B. Smith & Company.

Then there was in the Marie V. Spies' account at Kohler, Shear & Fish 56 cents of protest charges in the Marie V. Spies' account at E. B. Smith & Company, and 31 cents of protest charges, making a total of \$126.03.

Q. There is also a deduction setting forth that \$222.17. What is that deduction for, Mr. Reighley? A. That is \$67.72 of New York State tax, the 1936 tax, and \$154.45 of the 1935 New York State tax, a total of \$222.17.

Q. Were you able to determine if both of those items were paid by Mr. Spies for the year 1936? A. They show as payments. In my analyses of these figures here, I find that to be so. 260

Q. Do they show it as having been paid by him in 1936? A. Yes, they do.

Q. In addition to all other deductions, a total of \$725.45, would you tell us, please, what those deductions are? A. \$189.13 was paid to employees. That was out of the Murray R. Spies Special Account at the Underwriters Trust Company.

There was an office expense of \$536.32 out of the same account, as I recall.

Q. What is the total amount of those deductions for capital loss, interest on brokerage accounts, taxes paid during 1936, and those miscellaneous office expenses and salary paid there? A. \$2,253.09.

Q. When you deduct that total amount from the gross income which you have given us before, what is the net income, as you compute it, for the year 1936 of this defendant? A. \$50,587.11. 261

Q. Did you compute the tax due on that gross income for the year 1936, Mr. Reighley? A. Yes, the total tax was \$8,841.63.

Q. Do you have a schedule or something containing that computation? A. Yes (handing to Mr. Behrens).



Mr. Behrens: I would like to offer it in evidence with the understanding, of course, that it is not evidence of anything, but simply a visual mode of expressing this computation, your Honor.

Mr. Cahill: I object to the computation and the basis of it because it includes improper items.

The Court: Allowed.

Mr. Cahill: Exception.

(Marked Government's Exhibit 49.)

263 Q. Mr. Reighley, did you trace through these various accounts this \$38,000 that was deposited in the Marie V. Spies' trust account out at Lynbrook? A. Yes, I did.

Q. Were you able to find \$25,000 of that going into the hands of the Equitable Life Assurance Society of the United States? A. Yes, it did.

Q. Will you tell us through what accounts it went? A. \$38,000 came into the account on June 11, into the Marie V. Spies' account in trust for Murray R. Spies, Jr., account No. 14189; came in on June 11, 1936.

On June 16, 1936, \$33,000 was taken out of the account: \$3,000 went into the Marie V. Spies' regular account at the Lynbrook National Bank & Trust Company;

\$5,000 in the Marie V. Spies' account in trust for Barry Curtis Spies, No. 19494;

264 And \$5,000 went into that account and \$5,000 went into the Marie V. Spies' account in trust for Murray Robert Spies, Jr., No. 17837, at the Bank of Rockville Centre Trust Company.

\$5,000 went into the Marie V. Spies' account in trust for Barry Curtis Spies, No. 3353, at the South Shore Trust Company.

\$5,000 went into the Marie V. Spies' account in trust for Murray R. Spies, Jr., No. 3354, at the South Shore Trust Company.

\$5,000 went into the Marie V. Spies' account in trust for Barry Curtis Spies, No. 10473, at the Nassau County National Bank. That is at Rockville Centre, Long Island, and so are the other two.

\$5,000 went into the Marie V. Spies' account in trust for Murray Robert Spies, No. 10472, Nassau County National Bank.

Now in addition to that, on September 9 there was withdrawn from this account, this account 14189, \$5,000, and on that same day \$5,000—I made an error there on the date. That is July 25. That was \$5,000 on the same date.

Another \$5,000 was withdrawn from Marie V. Spies, in trust for Barry Curtis Spies, account No. 19494. A cashier's check was drawn to Marie V. Spies. That was No. 19850 and it was dated July 25, 1936, for \$10,000, and endorsed it over to the Equitable Trust Company.

266

Q. Do you mean the Equitable Life Assurance Society of the United States? A. The Equitable Life Assurance Society of New York that is.

Q. Was that an insurance company, Mr. Reighley? A. That is where that money went, between one or two accounts, into the insurance fund.

Q. That is \$10,000? A. That is \$10,000.

The other is, to be accounted for from other accounts. Now this 5,000—this account No. 10472 in the name of Marie V. Spies in trust for Murray R. Spies, Jr., at the Nassau County National Bank.

Q. Is that the account into which the \$5,000 went? A. We have accounted for the \$10,000. 267

Q. Will you answer my question? Is that the account which was opened with the \$5,000 withdrawn from the account into which the \$38,000 was originally deposited? A. That is correct.

Q. We are now tracing part of the \$38,000, is that correct? A. That is correct.

Q. Tell us what happened there. A. On July 27, \$5,000 went out of this account and cashier's check No. 19755 was drawn to Marie V. Spies on July 27, and endorsed by her to the Equitable Life Assurance Society of the United States.

Q. That is \$15,000 that we have. Let us take up the other \$10,000. A. Do you want me to go into account 10473? Some went into 10473.

Q. Yes.

The Court: Is the witness going to be very much longer?

269      Mr. Behrens: I am finished as soon as he has given us the other \$10,000.

A. In account 10473, which was Marie V. Spies for Barry Curtis Spies, there is twenty-five, I think, that I did not explain that went into it on November 28.

\$500 went out of the account on November 28 and was cashed at the Corn Exchange Bank.

Q. Let me stop you, Mr. Reighley. The money that went out of that account did not go to the Equitable Life? A. No.

Q. Let us forget about that for the time being and find the other \$10,000 which went over to the Equitable. A. The account of Marie V. Spies, in trust for Barry Curtis Spies, No. 3353 at the South Shore Trust Company, July 25, \$5,000  
270 was taken out of that account by treasurer's check, No. 6665, drawn to Marie V. Spies on July 25, 1936, endorsed by her to the Equitable Life Assurance Company.

In account 3354, that is, Marie V. Spies, in trust for Murray Robert Spies, Jr., on July 25, \$5,000 was taken out of that fund by treasurer's check No. 6666. That was drawn to Marie V. Spies, July 25, 1936, and endorsed to the Equitable Life Assurance Company.

**Q.** Let me ask you this final question: You have referred to these last two accounts in the South Shore Trust Company. Were those two accounts opened in the amount of \$5,000 out of the account in which the \$38,000 was placed?

**A.** Those are two accounts. On June 16 both accounts were opened with a deposit of \$5,000. It came out of Marie V. Spies, in trust for Murray R. Spies, Jr., account No. 14189 at the Lynbrook National Bank & Trust Company.

**Mr. Behrens:** I have no further questions of this witness.

**The Court:** The jury will be excused until Monday at 2 o'clock.

**Juror No. 11** will remain, according to the stipulation, and hear the testimony taken day before yesterday.

(To the jury) The jurors will not discuss this case with anyone during this trial. I enjoin that upon you very strenuously.

(All jurors left the court room with the exception of Juror No. 11.)

**The Court:** If I should step out during the reading, I shall come back later.

**Mr. Cahill:** If you wish to absent yourself during the entire time, we waive your presence.

**The Court:** If it is agreeable all around, I will leave.

**Mr. Behrens:** It is certainly agreeable to the Government.

**The Court:** Very good.

(The Court left the court room.)

(The reporter read the testimony of the witnesses taken on August 6, 1941.)

(Mr. Behrens showed Government's Exhibit 3 to the juror.)

(Adjourned to Monday, August 11, 1941, at 2 P. M.)

New York, August 11, 1941,  
2 P. M.

**TRIAL RESUMED.**

JOHN H. REIGHLEY resumed the stand.

The Court (addressing the jury): You have all observed the Court's injunction, not to discuss this matter with anyone during recess? I repeat it and I hope you will observe it continuously throughout the trial.

Mr. Behrens: I have finished my questioning of Mr. Reighley.

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*Cross-examination by Mr. Cahill.*

Q. Mr. Reighley, you have testified that Mr. Spies talked to you and Mr. Deneen several times about his income taxes? A. We had two conferences with him.

Q. Two conferences? A. Yes, sir.

Q. In April of 1939? A. April 22—no, not 1939.

Q. When was it? A. That would be in 1940.

Q. It was 1940, wasn't it? A. Yes.

Q. Is it 1939? A. No, it is April 22, and April 27, 1940.

Q. Did you ask him to come to see you? A. Yes, we did.

Q. You wrote him a letter? A. I did not. Mr. Deneen wrote him a letter. I am not sure whether he wrote a letter about both conferences or told him to come in, but he was told to come in.

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Q. And he came? A. Yes.

Q. You talked to him at other places, too, did you not? A. Not in 1940.

Q. Didn't you talk to him at his office? A. No, not in 1940. On April 5, 1939, we talked to him at his office and at another time a little bit later.

Q. April 5, 1939? A. 1939, yes.



Q. Did you ask him then for his records? A. We asked him for his records, yes, that is right.

Q. Did he give you some records at that time or shortly after that? A. No, it was some time after that.

Q. Did he explain to you why he could not give you all of his records at the moment? A. I do not think they were at the office.

Q. Did he say anything to you about his being dispossessed from the office and the records being scattered around a bit? A. No, that was not until some time later that he called my attention to it. I think the last time I called on him was when I took the check book back, the ones for Mrs. Spies which had no record—

Q. I beg your pardon? A. There was no record in the stubs as to this check book and at the time I recall he said he was going to be dispossessed. I do not know what date that was.

Q. Weren't his things piled up in his office at that time? A. No, I do not think so. I did not notice that.

Q. That was at 40 Exchange Place? A. Yes.

Q. Didn't he tell you on account of being dispossessed his records were somewhat in disorder? A. No. It had been several weeks before that that I asked for his records.

Q. Didn't he mention the effect of that confused situation? A. No, I do not think so.

Q. When you asked him for his records did you also ask for the records of Mrs. Spies, if she had any? A. No, I asked him for his records.

Q. Didn't you at any time ask him for Mrs. Spies' records? A. I do not recall that I asked for her records specifically.

Q. Did he offer them to you? A. Yes, he gave me those checks and some of the bank statements.

Q. Did he explain to you that he did not keep the records on Mrs. Spies' check book and stubs, that she did that herself? A. I believe that he did, yes.



Q. Didn't he tell you that the checks that she drew were merely for personal expenses and that she might not keep as good track of them as a bookkeeper? A. I do not recall that he mentioned that specifically, no.

Q. Did he say that at all in substance or in effect? A. No, he simply said that Mrs. Spies did not make any record in the stubs of her checks. That he did say.

Q. Was that after you had inquired as to her? A. No, that was before. That was before.

Q. Mr. Spies was told by one of you that he could stand on his constitutional rights and say nothing to you, is that so? A. Yes, Mr. Deneen told him that.

281 Q. Didn't he say that he would not do so, that he would tell you all he knew? A. That is what he said, yes.

Q. He prepared at one time and submitted to you by himself a four or five-page statement reciting transactions affecting his income, did he not? A. That was on April 27.

Q. 1940? A. 1940, yes.

Q. And he gave that to you? A. Yes.

Q. When did you give him the questionnaire which I believe is Government's Exhibit 21 and ask him to sign that? A. April 5, 1939.

Q. Did he sign it right away? A. Yes.

Q. Right in your presence? A. He made it out and signed it.

Q. He made no objection to signing it? A. No.

282 Q. Did he explain to you that he would give you all of the information he could in that questionnaire as far as his memory served him at that time? A. I do not recall that I asked him. I gave him the questionnaire to fill out and asked him to fill it out, which he did, and signed it.

Q. Didn't he tell you that that was all that he could remember at the time? A. I do not recall it.

Q. You do not recall the conversation? A. No, I do not recall that part of it.

Q. He told you, did he not, that he had a bookkeeper keeping the accounts of these little corporations in which he was interested? A. Not at that time, no.

Q. You did hear that? A. I did hear that later.

Q. These books were fairly well kept, weren't they? A. There were no books except a check book.

Q. The check books, the records on the stubs were clear, were they not? A. No, they were not very clear.

Q. What was missing? Wasn't a showing on the stub for each check, the purpose for which every check was drawn?

Mr. Behrens: I do not know what checks we are talking about. There are check books here for each corporation. It might help a good deal if we could probably exhibit the check books.

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Mr. Cahill: I won't go into that.

The Court: If the witness does not understand, he can so state.

Q. There were entries in the stubs indicating the purpose for which the checks were drawn, were there not?

A. Well, some of them did and some of them did not. Which ones are you referring to particularly?

Q. To the corporation. Did you look at Universal Shares? A. He only submitted one stub book of the corporations. That was in the First Mutual Corporation. That began, I think, in about April. My recollection is it was check 501.

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Q. April of what? A. That would be 1937.

Q. That was a corporation that he told you he had invested some money in? A. That is right.

Q. Prior to that with respect to the Universal Shares or any of the other corporations, didn't he show you books, stub books, or did you ask for any stub books? A. No, I did not ask for any.

Q. You did not ask him for any? A. No.

Q. Didn't he tell you when you asked, that he did not have Mrs. Spies' check books in his possession, that he would get them for you? A. I do not recall him having said that specifically, but he did get the check books of Mrs. Spies, the books and some of the checks.

Q. Didn't he tell you her records were incomplete and not as well kept as his own? A. He said she did not make any notations on the stubs what they were about.

Q. Didn't he explain to you that most of these checks were for personal expenses and that she did not specify everything on them? A. I do not recall that he said that.

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Q. You remember that Mr. Spies at some time told you that he intended to file an income tax return, intended to get the forms? A. Yes, he told me that on April 5, 1939.

Q. Do you remember that you told him that he would not relieve himself of any penalties by making a return at that time? A. No, I did not say that. I said by anticipating my report he would not.

Q. Don't they mean the same thing? A. That is what I said. I do not know how you are going to take it.

Q. Did you mean to tell him that he would not be relieved of any penalties if he filed a return before you completed your report? A. Certainly.

Q. That is what you meant? A. Yes, that is what I meant.

288 Q. He turned over his own check book on the Underwriters Trust Company? A. Yes, he did.

Q. And the First Mutual check book? A. One of the First Mutual check books. That is the one beginning with check 501.

Q. Did that cover the period of 1936? A. No, I think that is all 1937.

Q. He turned over to you the Lynbrook National Bank check book? A. That is right.

Q. The Rockville Center Bank & Trust Company? A. I do not recall that book, no, sir. He did give me some of the checks.

Q. And the Corn Exchange Bank? Did he give you information about it? A. He gave me some checks on that and also a bank statement on it, because—

Q. Didn't you tell Mr. Spies that he could not rely on any checks which might be missing because you got copies or records of everything anyhow? A. No, sir.

Q. You knew that you could get records of the checks that were drawn on these accounts and the deposits made?

A. I could get the record of the bank, whatever record the bank had.

Q. Didn't you discuss that with Mr. Spies? Don't you remember that he told you that he was not sure that he had every check or every record and that he would give you all that he had? A. He may have told me that because he did bring them down. I assumed that was all he had. He said he could not find any more. I am sure he said that.

Q. When Mr. Spies turned over to you the various check books and other records, do you recall exactly what he said about his control of the various accounts? A. At the time he turned them over to me?

Q. Yes. A. No, I do not think he said anything about control on that day, that date.

Q. Later on some time—you testified that at some time he said something to you about his control of the various accounts. When was that, and what did he say? A. That was in the conference of April 27th, 1939—rather 1940.

Q. Do you remember what his language was? A. No, I do not remember his exact language. He said that he and Mrs. Spies controlled the policy of the Distributors Fund, Incorporated.

Q. With respect to these bank accounts and brokerage accounts, do you remember what was said? A. With respect to the bank accounts Mr. Spies said that with respect to

the funds deposited in those—we asked him what the source of Mrs. Spies' funds were. He said they were primarily from whatever he gave her; that is, what she could save out of what he gave her; and the source of his funds primarily were from the United Sponsors and the United Standard Oil Shares.

Q. Do you remember discussing the Powers brokerage account with him? A. Yes, I remember that he said that there were certain deposits that went—certain amounts of money given to him by Mr. Powers which were to be used in the purchase of securities.

293 Q. Didn't he tell you on that occasion that those sums of money which were given to him by Mr. Powers were sums of money which belonged to Mr. Powers? A. Yes, he did.

Q. And he told you that any of the brokerage accounts were joint accounts of Mr. Powers and himself? A. No.

Q. Mr. Powers had an interest with him? A. No, he did not tell us that.

Q. He did tell you, didn't he, that Mr. Powers' money was in that account? A. He told us that Mr. Powers gave him the money used in the purchase of securities, but he did not tell me in what amount it was.

Q. Do you remember, Mr. Reighley, that you had no information that Mr. Powers gave money to Mr. Spies, and specifically in the brokerage account with E. B. Smith & Company? A. Not prior to the date of April 27th.

294 Q. Well, at any time? A. That I did not know before April 27 that he had money in that account? I did not know anything about Mr. Powers' money at that time.

Q. Didn't you check up some of the very money that was shown to be Mr. Spies' money and find that some was Mr. Powers' money? A. Not as far as that account. None of the money that went into the account that we could trace to Mr. Spies. We can trace that all through another source.



Q. Your testimony is that while Mr. Powers did give money of his own to Mr. Spies you could not say that it was money that specifically went into the Smith brokerage account? A. I could not say that any of it was put into the account.

Q. You know that he got money from Mr. Powers that belonged to Mr. Powers? A. That is what Mr. Spies said.

Q. Did you inquire from him as to that subject? A. Inquired as to the Powers account. We found that he opened the account. That was opened in December, 1936. My recollection is that there was a deposit on the 31st that came out of account 10473 at the Nassau County Trust Company. That account would either be in Murray R. Spies, Jr., or in Barry Curtis Spies, Jr. Those were both trust accounts. 296

Q. Did you ever investigate to find out how any money got from Mr. Powers to Mr. Murray R. Spies or Marie V. Spies? A. We haven't anything but what his testimony is on it, what he said, rather.

Q. Did you ever question Mr. Powers on that? A. I did not question Mr. Powers on it.

Mr. Behrens: I object to that as irrelevant and hearsay.

Mr. Cahill: I think that is relevant because money in this brokerage account is charged to items of income.

The Court: At least it is competent and relevant, connected with the cross-examination, to ask the witness whether he talked to Mr. Powers. 297

The Witness: I never saw Mr. Powers.

The Court: That disposes of the necessity of ruling on it.

Q. With respect to the United Sponsors, a page of the ledger has been put in evidence here as Exhibit 47, I believe. The page is headed "M. R. Spies, Notes Payable". You looked into that, I presume? A. Yes, I did.



Q. And you charged the sums paid to either Mr. or Mrs. Spies on that account as items of income against Murray R. Spies, the defendant? A. No, not all of them. Some of those were repayments on account of notes payable.

Q. Did you know that Douglas Hillyer had an interest in part of that note? A. No, sir.

Q. Weren't you told that by Mr. Spies? A. I do not recall that I was.

Q. Didn't he tell you that Mr. Hillyer was interested to the extent of \$2,000? A. No.

299 Q. To some extent? A. No, I do not recall that he did say Mr. Hillyer was interested in it.

Q. You do not recall anything being stated about Mr. Hillyer's connection with that account? A. Not in connection with this account, no.

Q. You did talk to Mr. Spies about that account and what it represented, did you not? A. I recall that we gave Mr. Spies an opportunity to look over this account at one time, but I do not recall that he ever undertook to explain what was in it.

Q. Don't you remember that Mr. Spies told you that Mrs. Spies had advanced money to United Sponsors? A. Yes.

300 Q. And the note represented \$8,400, approximately, if not exactly, and wasn't it in return for money advanced by Mrs. Spies to that corporation? A. That she advanced in 1935 or advanced moneys to that corporation.

Q. To the extent of that account? A. According to the account itself there was credited on that account, that is, the account on the books of United Sponsors, \$7,002.83. That is made up of three elements: On December 6, \$5,002.83 and on the 10th of December, 1935, \$400; and \$1,000 on the 23rd. That makes a total of \$7,002.83 credited to the account on account of money received from Mrs. Spies. There was also salary credited into the amount of \$1,000

commissions of \$891.51, making a total credited to the account of \$8,894.33.

Q. You said that there was one item of \$5,002.83 credited to the account of loans, is that right? A. That is correct.

Q. What did you say the \$2,000 was credited on account of? A. \$400 on account of loans and \$1,600 on account of loans. That makes a total of \$7,002.83. With respect to the \$2,000, that was a combining of the \$400 and the \$1,600. That is right.

Q. A note was given for 8400 and something by United Sponsors? A. I do not know whether it was one or two notes. Mr. Spies testified or, rather, told us that on April 27, 1940; that she loaned about \$5,000 to this corporation or perhaps to both this corporation and the United Standard Oil shares.

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Q. Didn't you say there was a sum of \$2,000 made up of \$200 and \$1600 in addition to that? A. In addition to the \$5,002 another item of \$400 and \$1,600.

Q. Making \$7,002.83? A. Yes, on account of notes payable.

Q. On account of loans? A. It would be a loan, of course, to the company by her. If it has actually given a note or not, I do not know anything except what the record shows.

Q. Money was advanced by Mrs. Spies to the corporation and she got a note for it? A. In 1935, yes.

Q. And it was paid back in 1936, wasn't it? A. Yes, some of it was paid back in 1936, or all of it, perhaps. I do not know.

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Q. Wasn't it paid back in 1936? A. Had nothing to cover that in the books.

Q. Didn't you include some of that total to the item of income in computing Mr. Spies' income for 1936? A. Not that item.

Q. What did you take out as repayment of the loan out of that \$8,800? A. Well, the exact amount of the repayment of the loan charged against that account is \$7,056.08. That is the total charge in the account.

Q. How much do you say is credited as repayment on account of the loans? A. That would be \$7,056.08 as the total charges in that account.

Q. That note was given for how much? A. Notes payable was shown as \$7,002.83.

Q. Wasn't the total \$8,800 mentioned by you? A. Yes, but there was a credit for salaries of \$1,000 and \$891.50 of commissions. They are thrown into the notes payable account, but whether he gave a note for it I do not know, but the total charges—the total credits in that account was \$8,894.33.

Q. Did you take the balance and charge it in your total of \$10,000 of unexplained items of income? A. Oh, no. That is right in the \$10,000, all unexplained items there.

Q. In making up your computation of income, Mr. Reighley, did you take all of the deposits in bank accounts and charge those to Spies as income? A. No, sir.

Q. How did you make it up? What use did you make of the bank accounts and the deposits shown in them? A. In the bank accounts alone there was an unexplained item of \$10,439.52.

Q. That is not a single item, is it? It is a collective item? A. That goes through the whole group of accounts. There was \$57 interest in these accounts and then \$3,461.52 of salary that came out of the United Sponsors and the \$38,000 from Mr. Kenyon, which make a total gross income from bank deposits, looking at it from the standpoint of deposits, of \$48,958.04.

Q. What I want to find out is your method of computation by which you reached this total. Did you find a deposit of \$1,000 in an account of Mr. Spies and did you include that as an item of income in computing his income

for the year 1936? A. You mean an outside account separate and distinct from a bank account?

Q. What do you mean by bank account? A. You asked about the deposits in bank accounts, whether they were taken into consideration. Yes, I took into consideration the income as deposited that we found were from income and from outside sources that were not deposited, if we could identify it. We would not take it in twice.

Q. Whenever you could not find any matching withdrawal or anything of that nature and you found, let me use a round figure, \$1,000 deposited, you would assume it was income? A. \$1,000 deposited in the bank account, if I could not explain it otherwise, that is correct.

Q. As a deposit unless it were shown that they were not income, you assumed they would be income? A. Yes.

Q. And the deposits of Marie V. Spies were treated in the same manner as income of Murray R. Spies? A. They were all treated the same way.

Q. And deposits in the brokerage accounts were likewise indicated in the computation of income? A. In the computation of the income the amount that was deposited was not taken into consideration at all. In a brokerage account it is purchases and sales, and the brokerage account is taken into consideration.

Q. You took into account only profits on the sales of stock in that account? A. Certainly not. Profits and anything else.

Q. Will you explain what you mean? It is not clear to me. A. It is the difference between the cost and the sales price which is reflected in the brokerage account.

Q. What brokerage account? Do you mean that if he bought stock for \$1,000 and sold it for \$1,100 that you just put \$100 and charged it as income to him? A. Yes.

Q. Didn't you charge other things to the brokerage account as income? A. No.

Q. Didn't you charge the initial deposit with which the account was opened? A. Certainly not.

Q. As a matter of fact, there were no profits in these accounts at the end, were there? A. There was no net profit. There was a profit in only one. In one there was \$175 profit in one account.

Q. How much? A. About \$175. I will check that just a second. There was \$1,345.07 of loss in the Marie V. Spies account at Kohler, Fish & Company. There was a loss of \$10.31 in her account at E. B. Smith. There was a profit of \$175 in the R. W. Powers account at E. B. Smith, making a net loss of \$1,179.42.

Q. Wasn't there a deposit of \$1,500 in the Powers account in 1936 in opening the account? A. In 1936?

311 Q. Yes. A. No, sir.

Q. In telling you that amount that was a little inaccurate. You took into consideration the Underwriters Trust Company and the deposits in that as you did the deposits in the other banks in computing Mr. Spies' income, didn't you? A. No.

Q. Did you find in the Underwriters Trust Company a deposit of \$1,500 sometime in 1936? A. Yes, that was still in the year. I think it was January 4, \$1,500.

Q. Was that the opening of the account? A. No, the account was not opened until later, in December, 1936.

Q. With respect to the Underwriters Trust Company, you say you did find a \$1,500 deposit? A. Yes.

Q. When? A. I will check that exactly for you in just a second.

312 Q. If it is not too much trouble. A. I can get it in just a minute. I think I have it right here. That was on January 14, 1936, \$1,500 was deposited.

Q. Do you remember talking with Mr. Spies about Mr. Powers giving him that money? A. Yes, Mr. Spies told me that Mr. Powers gave him that money.

Q. You treated that \$1,500 as income, did you not? A. I did.

Q. That was included in your calculation of \$10,000 of unexplained items? A. Yes, that is in there.



Q. With respect to this \$38,000, that was what Mr. Spies got out of the \$40,000, was it not? A. Yes, sir.

Q. That was deposited in the account of Marie V. Spies, I understand? A. That is No. 14189, Marie V. Spies, in trust for Murray R. Spies, Jr.—Murray Robert Spies, Jr.

Q. That was an old account, was it not? It was not opened at that time for the purpose of receiving this deposit? A. No, it had been opened before; yes, sir.

Q. With respect to the \$25,000 annuity in the Equitable Life Assurance Society, wasn't that annuity taken out in the name of the defendant Murray R. Spies himself? A. Yes, it was.

Q. It was for the purpose of an annuity to him, was it not? A. Yes.

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Q. And after his death to his wife and children, if there was anything left? A. Yes, I find it was. That is right.

Q. He got some loan from the Manufacturers Trust Company on that annuity, did he not? A. Yes, sir.

Q. Those loans, the papers in those loans, were signed in every instance by both Mr. and Mrs. Spies, the defendant and his wife? A. I do not know. I could not say that.

Q. You do not know. Do you know how much cash was in all the bank accounts on June 15, 1937? A. I did not find any account at all on June 17. I do not believe I can get any nearer to it than about the 10th, right offhand.

Q. Wasn't the total less than \$1,800 in all the accounts? A. My recollection is that as of June 10 it was about thirteen hundred and some dollars.

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Q. Mr. Reighley, can you explain every item of the list including the \$399 deposited in the Rockville Center Bank & Trust Company on August 12, 1937? A. Yes, I think that list is all explained deposits.

Q. And it is 1936, isn't it? A. Yes, August 12, 1936.

Q. In what form was that deposit made, if you can tell us? A. I have it noted here in the cash column. I notice I show it coming from the Colonial Trust Company, but



I could not find it at the Colonial Trust Company. I cannot tell whether it was cash or not. I noted it over in the cash column.

Q. Not knowing where it came from, you put it down as cash? A. Yes.

Q. Is that right? A. Yes.

Q. And you then included it as income? That was one of the items that you have lumped together with other items to make the \$10,000 of unexplained income? A. Yes.

Q. Do you remember seeing this letter before? This letter is dated August 11, 1936 (handing witness)? A. Yes, I have seen this before, at the other trial, and I have a copy of it.

317 Q. A copy has been given you? A. Yes, I have a copy of it; yes, sir.

Mr. Cahill: I ask that this be marked for identification.

(Marked Defendant's Exhibit A for Identification.)

Q. Did you discuss with Mrs. Spies or with anybody the source of that deposit other than you have indicated? A. I gave Mr. Spies an opportunity to go over every account in every schedule, asking him to explain that item as well as others.

318 Q. Didn't he tell you that he did not have his papers handy at the time? A. He told us finally that he could not explain that. That is all.

Q. Didn't he give you an explanation of this \$399 item or didn't you get it and didn't you learn that that was in the form of a check drawn on another account of his and deposited in the Rockville Center Bank? A. No, sir, he has never yet identified the account out of which that came.

Q. You have seen his signature? A. Yes.

Q. Is that his signature? A. Yes, that is right, that is his signature.

Q. Did you go to the bank at Rockville Center to get the original? A. Yes, I have the original but it does not explain anything.

Mr. Cahill: I move that that be stricken out as a conclusion.

The Court: Granted.

Q. You did get the original of this at the bank at Rockville Center? A. No, I have a certified copy of it.

Q. You saw the original? A. Yes.

Mr. Cahill: I offer this in evidence.

Mr. Behrens: I have no objection to this offer.

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The Court: Mark it Exhibit A in evidence.

(Defendant's Exhibit A for Identification now received in evidence.)

Mr. Cahill: I should like to read it. It is very short.

The Court: You may do so without apologizing.

Mr. Cahill: This is a letter on the letterhead of Murray R. Spies, dated August 11, 1936, to the Bank of Rockville Center Trust Company. (Same read to jury.)

Q. I call your attention to another item of \$612.28. This is May 1, 1936. There is an item at the same time of \$712.28, the same date. Have you got those? A. The \$712.28 I have here.

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Q. That was a deposit, was it not? A. \$712.28 is an unexplained deposit in Marie V. Spies' regular account at the Lynbrook National Bank & Trust Company.

Q. In the account of Marie V. Spies, did you say? A. Yes, that is correct.

Q. Didn't you find this \$712.28? A. Yes.

Q. Didn't you find that just prior to that deposit or a little prior to it, to be exact on April 8, 1936, Marie V.

Spies obtained \$812.28 from E. B. Smith & Company? A. Yes. I do not remember the account that went into right offhand, but that is correct.

Q. Don't the records show that that same \$812.28 was deposited in the account of Marie V. Spies in trust for Murray R. Spies, Jr., on April 13, 1936? A. April 13, 1936, and was deposited as coming from E. B. Smith & Company.

Q. \$812.28? A. Yes.

Q. That was April 13? A. That is right. I have April 13 here.

Q. April 8 she obtained \$812.28 from Smith & Company? A. April 13 it was deposited in her account No. 14189, in trust—

323 Q. Do you find a withdrawal from that account of \$612.28? A. On May 1 I have that withdrawal.

Q. On May 1? A. Unexplained.

Q. And then a deposit of \$712.28 in the Lynbrook Bank, is that correct? A. That is correct.

Q. These three items have the same legend, \$612.28, \$712.28 and \$812.28. Did you include everything in these as items of income of Mr. Spies? A. I included \$712.28.

Q. How about the \$812.28? A. No, that is a brokerage item.

Q. Of Marie V. Spies. That was not included in the computation? A. No, it would be worked out in the work-out of the loss from the brokerage accounts.

324 Q. Who deposited the \$712.28, or in whose account was it deposited, if you know? A. Mary V. Spies' regular account at the Lynbrook National Bank.

Q. You do not act the same as to these similar amounts, \$612.28, \$712.28 and \$812.28? A. No, \$712.28 is a different account.

Q. You did not investigate any possible relationship of these three items one with another? A. No. It may be a coincidence.

Q. And you put it down? A. Yes.

Q. You included one of these items of income? A. \$712.28 is an unexplained deposit, yes.

Q. I call your attention to an item of \$650 on March 13, 1936, deposited in the Underwriters Trust Company. A. Yes. That is an unexplained deposit.

Q. That was included in the \$10,000-odd of unexplained items of income? A. That is correct.

Q. Was that in Mr. Spies' own account? A. Yes, that is in Murray R. Spies' personal account at the Underwriters Trust Company.

Q. Did you find a withdrawal of that same amount, \$650 from the account of Marie Spies, in trust for Murray R. Spies, Jr., on March 12, 1936, the date before the deposit in the Underwriters Trust Company? A. Give me the withdrawal of the bank on it. 326

Q. I have the check. I will show it to you. A. This is 14189, is it?

Q. I do not know the number of the account. A. Doesn't it show on the back?

Q. That is right. A. 14189. What was that date, please?

Q. The date of the withdrawal? A. Yes.

Q. Withdrawn from the Lynbrook National Bank from Murray Spies' account, March 12, 1936? A. That is a withdrawal from account 14189.

Q. That is right. A. I allowed that as a transfer to Murray R. Spies' regular account on that date.

Q. Didn't you charge off the \$650 deposited the next day in the Underwriters account of Murray R. Spies as an item of unexplained income? A. I allowed one on January 15 against the Manufacturers Trust Company; and on March 12 there is \$650 I show as a deposit in the Marie V. Spies regular account at the Lynbrook National Bank & Trust Company. 327

Q. You included that in the items of explained income? A. No. That is a transfer of funds.

Q. Did you charge the deposit in the Underwriters Trust Company as an item of unexplained income? A. Yes, I would, in that instance.

Q. I am not quite clear how much you charged to income. Will you tell us? A. \$650 in the Underwriters Trust Company would be itself the income.

Q. That is March 13, 1936? A. That is right.

Q. You charge that as an unexplained item of income? A. That is correct.

Q. You did not take into account the fact that there had been withdrawn by Mrs. Spies from the Lynbrook National Bank the day before the same amount? A. Wait just a second. What account do you refer to, 14189?

Q. Yes. A. If I may look at this check?

Q. You may. I guess you probably have a record of it, Mr. Reighley. A. On March 12 I have an allotment going out of the \$650. This is a withdrawal from the Marie V. Spies account, in trust for Barry Curtis Spies. This is on March 12. I show that \$650 as going into the Marie V. Spies regular account at the Lynbrook National Bank & Trust Company.

Q. And charge it as an item of income? A. I certainly did, as a transfer of funds.

Q. Didn't you say that you listed but one of these items of \$650 to an unexplained item of income? A. That is a different item over in the other account.

Q. That was the next day? A. Wait just a minute. I have the check book of this account here. Here is \$650 coming into the Lynbrook National Bank and it is Marie V. Spies regular account, on March 12. So I applied that item of \$650 coming in the other bank account on that date to this account. I could not put it into the Manufacturers Trust Company.

The Court: Underwriters?



A. (Continued) Underwriters Trust Company account because I had already applied the item of the other. I gave him credit for that item.

Q. Which account did you charge as income, which deposit? A. The deposit that was charged as income would be the one in the Underwriters Trust Company.

Q. Do you also have in that account on the same day—March 12 is the date of the withdrawal, from the Lynbrook Bank, the amount of \$850 going to the Kohler-Fish brokerage account? A. Matter of \$850 from which account was it, please?

Q. Withdrawn from the Marie V. Spies account in which the \$650 had been deposited? A. Yes, March 12, Marie V. Spies made a withdrawal of that item of \$850, going to Kohler, Shear, Fish & Company.

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Q. I believe I have already asked you about an item of \$1,500 deposited in the Underwriters Trust Company on January 14, 1936? A. Yes, sir.

Q. That is part of your total of unexplained income, is it not? A. That is correct.

Q. Wasn't that the amount that Mr. Spies told you came from Mr. Raymond Powers? A. Yes, he told me it came from Mr. Powers.

Q. When you were going over the stubs of the checks did you examine the stubs to determine what each check was for, or did you simply add up the totals? A. You mean in the Underwriters Trust Company?

Q. In any of these banks, what was your procedure? A. Whenever we had them we looked at the stubs, if they had any information on them.

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Q. Didn't you make notes of what disbursement it was? A. We have schedules showing what the disbursements are for.

Q. You did examine the stubs to determine that? A. We examined everything that was there.



Q. You looked into the books, did you not, into whatever books were given to you, and the stub checks? A. The only books that were given were the stub checks.

Q. If the records which were made available to you did not indicate the source of the money, you charged it to Murray R. Spies as income? A. Or if Mr. Spies could not explain it. He was given the opportunity to go over these.

Q. I am asking you now about your own investigation and your procedure. You charged as income to Mr. Spies any amount that was not ultimately traced? A. Yes, anything that I could not find an explanation for or he could not explain we included it as income.

334 Q. It is a fact that Mr. Spies did not interfere with you in the course of your investigation at all? A. No, the investigation was made mostly at my office with respect to the books. He did not have an opportunity.

Q. You did have some contact with Mr. Spies? A. Only on April 5 when I turned the checks—the book of checks back to him.

The Court: April 5 of what year?

The Witness: 1939.

Q. You met him twice in 1940? A. Yes, on the 5th of April and on the 27th.

336 Q. Didn't he tell you that he would give you any other records that he could locate? A. Yes, he said he would get all of the records that he could.

Q. And he did bring some back to you? A. Yes, just the ones I have mentioned.

Q. He did bring some back to you? A. He did not bring any records back, certainly not. The only record—if you are speaking about when I got the records, I got these records possibly, say, two weeks after April 9.

Q. He gave them to you? A. He did not give any records after that time.

Q. Do you mean he gave you no records, no papers, in connection with his income? A. No, he gave me all these records, these checks, stub books. All these he gave to me.

Q. Did Mr. Spies talk to Mr. Deneen at times when you were not there or were not listening, if you know? A. Not that I know of.

Q. Mr. Spies talked to you freely, did he not, after he had been advised that he could rest on his constitutional rights?

Mr. Behrens: I object to this.

The Court: Sustained.

Mr. Cahill: Exception.

Q. With respect to this \$40,000 transaction, Mr. Reighley, there has been some testimony that Mr. Spies received \$40,000 on June 11, 1936, in cash. Do you recall that? A. Yes.

Q. There has been testimony about a check being made out and used which did not bear the endorsement of Mr. Spies. Do you recall that? A. Yes.

Q. I show you a photostat of a check dated June 10, 1936, and ask you whether you have seen that check before? A. Yes, I have.

Q. That is a check for \$40,000, is it not? A. Yes, sir.

Q. Do you recall seeing the endorsement of Murray R. Spies on the back of that check? A. I did on the original check.

Q. Where is the original check, if you know? A. That was Exhibit 3102 of the S.E.C. exhibits. I do not know what became of it. It never cleared. We never used it.

Q. You think it is with the Securities and Exchange Commission? A. It was their exhibit. I do not know where it is now.

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*John H. Reighley—For Government—Cross.*

Mr. Cahill: I ask that that be marked for identification.

(Marked Defendant's Exhibit B for Identification)

Q. Did you check the records of the company that transported the \$40,000 to Rockville Centre? A. Did I check the records myself?

Q. Yes. A. No; I did not make any check of those.

Q. Did you have them checked? A. They have been checked. I did not have them checked.

Q. Some of those records are in the name of the defendant Murray R. Spies? A. Yes, they are in the record yet.

341 Q. They show that he was the customer who caused the cash to be transported? A. Yes.

Q. That money was taken to Lynbrook and put in an old account of Marie V. Spies? A. Account 14189.

Q. Which had been there for some time? A. Yes, sir, in trust for Murray R. Spies, Jr. I do not know whether it was opened at the beginning of the year. I can check it.

Q. It was not an account opened on that day? A. No, it was not an account opened on that day.

Q. Was it \$38,000 or \$40,000 that was deposited? A. Thirty-eight.

Q. You found that \$2,000 went to somebody else, is that right? A. Yes.

342 Q. The \$38,000 that you say was in the account was in trust for the son named for Mr. Spies, Murray R. Spies, Jr. A. Yes, sir, it is credited in the account on June 11, 1936.

Q. I show you this original. This was marked before. A. I beg your pardon?

Q. I show you this original. That was marked before? A. In this case?

Q. Yes. A. No, sir.

Mr. Behrens: Your Honor—

The Court: This is a good time to take a recess. I will excuse the jury first and then we can have a discussion before we actually have our recess.

(The jurors left the court room.)

The Court: The record will show that the following took place outside of the presence of the jury.

Mr. Behrens: Your Honor, two days ago Mr. Cahill asked me to furnish him with a check to the order of Murray R. Spies for \$40,000, and he referred to that check as having been offered in evidence at the last trial. I did not engage in the last trial. I did not participate in it in any way. I assumed there was such a document. Upon checking over all of the exhibits at the former trial of this action I find there was no such exhibit.

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The investigators who were working with me recall what they think is actually a photostatic copy of just the face of a check for \$40,000 drawn on the North Bergen Trust Company by Kenyon & Company on June 10, 1935.

This witness has said he recalled seeing the original once upon a time and assumes that the S.E.C. has it. Why the back was not photostated, I do not know, your Honor. I sent the agent upstairs to bring down a transcript of the account of Kenyon & Company with the North Bergen Trust Company, which will show if this check cleared at all.

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What is the purpose of it?

The Court: If it had the signature, it would show on the photostat.

Mr. Behrens: Yes, from the face of the photostat.

Mr. Cahill: I think that this was offered, but I could not say that it was.

Mr. Behrens: I object to the exhibit. It was not offered. Even the other check for \$40,000 was not offered at the last trial.

The Court: Apparently this check which was assumed to be used has never been used.

Mr. Cahill: It bore his endorsement, Mr. Spies says.

The Court: There does not seem to be any evidence that the check was operative.

Defendant Spies: I endorsed that check the day before I received the cash. That is the point at issue here, whether it went through the bank or not. It does not make any difference on the question of whether I knew it was going through the bank when I endorsed it.

The Court: There was another check?

Defendant Spies: That I never saw and will so testify. That is the check that I endorsed, that I signed before I could get the money. They never showed me the other check at all. It really did not bear my name at all.

Mr. Cahill: I suppose it will be the subject of testimony by the defendant.

Defendant Spies: They made that use of a receipt from me and they insisted upon me signing it and endorsing it before I got the money. That is why it is such an important issue here.

The Court: Is Kenyon & Company available?

Mr. Behrens: No. Kenyon himself is dead. We will bring down a transcript of the account of Kenyon & Company with the North Bergen Trust Company.

Mr. Cahill: I am interested in just what it said. If the only check he saw was this one which he endorsed—

The Court: He can testify to that.

Mr. Behrens: Yes, he can testify to anything at all. I do not want to be put in the position of having records and not giving them to the defendant. That is all, your Honor.

Mr. Cahill: I did not insinuate anything of that nature. I did not mean to convey that impression. I know Mr. Behrens well.

The Court: If you attempted to offer it and there was an objection, I think I would have to sustain it. When it is offered after appropriate testimony is given, I will have to rule on it at that time.

All right, we will take a recess.

(Short recess.)

Q. Mr. Reighley, if you deduct the \$10,439.52 of unexplained items from the income of 1936, what income do you get? A. It would be \$40,148.59.

Q. That total represents the only income that you could explain for the year 1936, isn't that so? A. Yes, it represents the explained income.

Q. Did you find any other source of income by Mr. Spies other than his small salary and the \$38,000 for 1936? A. A total of \$40,148.59 explained items.

Q. You included the \$10,439.52, added it to the income because it had not been explained to your satisfaction? A. That is right.

Mr. Cahill: That is all.

The Court: Any redirect?

Mr. Behrens: Just a question or two, your Honor.

*Redirect examination by Mr. Behrens.*

Q. The total figure that you gave, is that gross or net, the figure of \$40,000 unexplained? A. That is a net figure.

Mr. Behrens: May I have Defendant's Exhibit A?

Mr. Cahill: Yes (handing to Mr. Behrens).

Q. What has been deducted in arriving at your net figures, Mr. Reighley? A. The interest paid was \$126.03;



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*John H. Reighley—For Government—Redirect.*

the interest paid on the brokerage accounts through checks of \$222.17; and other deductions which included salaries and supplies—I will give you that exactly here.

Q. Was that \$725.45? A. That is \$725.45, made up of \$189.13 for employees and \$513.32 office expenses, which makes a total of—

The Court: Did you deduct the loss from securities?

The Witness: I deducted the loss from securities, \$1,179.44. That left a total net income of \$50,587.11. And we took out \$10,439.52, which still left a net income of \$40,148.59.

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Q. I call your attention, Mr. Reighley, to Defendant's Exhibit A in evidence. It starts off, "I enclose my check in the sum of \$399 interest for deposits with you." I ask you if you have ever been able to find out on what account this check of Mr. Spies of \$399 was drawn on? A. No.

Q. Have you asked him about that? A. Yes, we did, gave him an opportunity to explain that as well as the rest of the unexplained items.

Mr. Cahill: The question was whether he asked about that check or whether he gave an opportunity to explain.

The Witness: No, not specific.

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Q. With reference to the \$10,439.52 unexplained deposits—

The Court: Do you want to ask a question as to whether he was offered an opportunity?

Mr. Behrens: That is the next that I am going to ask.

The Court: All right.

*John H. Reighley—For Government—Redirect.*

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*John J. Deneen—For Government—Direct.*

Mr. Cahill: I think that the Government's witness has made that statement about four times in the course of my examination.

The Court: I tried to say that an objection when an answer is not responsive, I think it might be that the person who asks the question does not put the proper objection as to the question of his adversary. I have seen it done the other way hundreds of times. But, strictly speaking, I would so rule.

Mr. Cahill: That statement has been made four or five times on the part of the witness. I think it is unnecessary repetition.

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Mr. Behrens: This is the final question?

Q. With reference to the \$10,439.52 of the so-called unexplained bank deposits, can you tell us how many times an opportunity was given Mr. Spies to explain each and every one of those unexplained items? A. Three times.

Mr. Behrens: Thank you. No further questions.

Mr. Cahill: That is all.

(Witness excused.)

JOHN J. DENEEN, called as a witness on behalf of the Government, being first duly sworn, testified as follows: 357

*Direct examination by Mr. Behrens.*

Q. What is your occupation, Mr. Deneen? A. Special Agent of the Bureau of Internal Revenue, United States Treasury Department.

Q. How long have you been so employed? A. Since July 1, 1935.

Q. Do you know this defendant, Murray Spies? A. Yes, sir, I do.

Q. Will you tell us when you first met him? A. I first met him April 22, 1940.

Q. Where was that? A. In the office of Mr. Reighley at 90 Church Street, New York City.

Q. Did you meet this defendant again after that, Mr. Deneen? A. Yes, sir, I did.

Q. When was that? A. On April 27, 1940.

Q. Where did you meet him on the second occasion? A. In Room 813, 90 Church Street, New York City.

359 Q. At those two conferences did you ask Mr. Spies how many dependents he had during 1936? A. Yes, sir, I did.

Q. What did he say? A. He told me on April 27, 1940, that he was married, his wife's name Marie V. Spies, and he had two children at the time, aged nine and four.

Q. With reference to 1936 did you ask how many dependents he had for that year? A. I did not ask him specifically at that time, no, sir.

Q. Did he claim any dependents in 1936 other than his wife and two children? A. No, sir, he did not.

Q. Did you ask him about his place of business during the year 1936? A. Yes, sir, I asked him and he told me his place of business was at 40 Exchange Place, New York City.

360 Q. Did you ask him for the year 1936 where he resided? A. Yes, sir, I did. He told me that from November, 1934, until October, 1936, he resided at 1 Marion Place, Rockville Centre, Long Island, New York, when he moved to 135 Eastern Parkway, Brooklyn, New York, where he lived until September, 1937.

Q. With reference to the first time you met Mr. Spies, did you have any discussion with him with reference to unexplained bank accounts or bank deposits? A. Yes, sir, I did.

Q. Will you tell us what happened with respect to that?  
A. Mr. Spies came into Mr. Reighley's office and Mr. Reighley had compiled a number of items deposited by Mr. Spies in either his own name or in the name of his wife in trust for their children or in her own name, and there were a number of these deposits that we did not understand and we took each one that we did not understand up with Mr. Spies individually and we provided him with a piece of paper and he noted down the main deposits in each of these accounts on the given date that we did not know about.

Q. Did you have any talk about his getting information with which to explain that? A. Yes, on April 22, 1940, he said that he would take up all these individual items with his wife and that he would be back on April 27 and try to explain those things to us. 362

Q. Did he later, on the 27th of April, 1940, did he explain those items to you at the time? A. When he returned on April 27th, 1940, he told us that he could not secure any explanation of those items.

Mr. Cahill: What was that last answer?

The Court: The reporter will read it.

(Record read.)

Q. Do you recall any other occasion where you discussed with this defendant these unexplained items of deposits aggregating \$10,000-odd? A. Yes, sir.

Q. When was that? A. Some time during the latter part of March or the early part of April of this year, 1941. 363

Q. Where did you have that discussion? A. I am not quite sure of the room, but it was in this building.

Q. Did you ask him to give you an explanation again at this time of these various unexplained bank deposits? A. Yes, sir, we did.

Q. Did you get an explanation? A. No, sir.

Mr. Behrens: You may inquire.

*Cross-examination by Mr. Cahill.*

Q. When Mr. Spies talked to you in this building, who were present? A. Mr. Spies, yourself, Mr. Loonin, Mr. Reighley, Mr. Raymond Whearty, and myself.

Q. Mr. Whearty was the Assistant United States Attorney who made the examination? A. Yes.

Q. I did not remain? A. You sat there for a few minutes reading, as I recall.

Q. That was some time in this year, wasn't it? A. Yes, sir.

Q. Early this year? A. Early this year.

365 Q. Do you remember that on that occasion Mr. Spies asked for certain books in the possession of the Government which he wanted to enable him to trace certain funds that you said were income? Do you remember that? A. I remember Mr. Spies asked for certain of our working papers, yes, sir.

Q. Didn't he ask for certain books, certain check books and other records that would enable him to trace some of these items of alleged income? A. He asked for the brokerage and bank accounts, all we had, and we let him look at them.

366 Q. Didn't you refuse to give him some of the books and records which he asked for? A. It seems to me, as I remember it now, that he asked for some book that did not contain any information relative to the unexplained bank deposits.

Q. Do you remember Mr. Whearty said to him on that occasion that he felt the Government could not disclose its case in advance? A. I think Mr. Whearty said something like that, yes, sir.

Q. Did Mr. Spies tell you that he had been ill during 1937? A. Yes, sir, he did.

Q. Did he tell you that he had been in a state of fear over his illness experience? A. No, sir, I do not remember

him saying anything about fear or illness. He did tell me he was sick with sciatica.

Q. Do you remember he told you that he was unable to get insurance? A. No, sir. He did not tell me anything about insurance on April 22, 1940. April 27, 1940, was the time I made a report of the March or April investigation.

Q. Didn't he tell you at some time that he was unable to get insurance? A. He never told me personally, no, sir.

Q. Wasn't it stated by him in your presence? A. Yes, sir.

Q. I am including that in the question. Do you remember that he said to you, "I have \$38,000 here in the name of Mrs. Spies," and that it was his money? Do you remember he said that? A. I remember he told me that he discussed this \$38,000 with Mrs. Spies and she told him that he could do with it as he wanted, he had control of it.

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Q. He told you that himself? A. Yes, sir.

Q. Do you remember that Mr. Spies told you that he would give you any book or record that he had bearing on this question of income? A. He told me that several times, but he never did bring any book or record.

Q. Do you mean that he withheld anything that he had? A. I do not remember whether he withheld anything or not.

Q. You do not mean to convey that to the jury? A. No, sir, I just know he never gave me any records.

Q. You did not get any records at all bearing on the income of Mr. Spies? A. No, sir.

Q. Didn't you from the corporation? A. Not from Mr. Spies—Mr. Reighley.

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Q. You know that he was connected with that corporation, didn't you? A. Yes, sir.

Q. You knew that he did not put any obstacle in your way as far as you discovered in this case on your investigation?

Mr. Behrens: I object to that.

The Court: Sustained.



Mr. Cahill: I take an exception.

The Court: Too vague.

Q. He answered all of your questions, did he not? A. Yes, sir.

Q. He signed the questionnaire, Form 60, immediately when it was put before him, did he not? A. I did not have anything to do with that, Mr. Cahill.

Q. Were you there? A. No, sir.

Q. He never objected to answering any questions which you asked him as to his income? A. No, sir.

371 Q. He told you as a matter of fact the whole story of his life, did he not? A. He told me about when he was born, where he had been to school, other than telling me where the \$10,000 came from.

Q. You are very much interested in the \$10,000. That was the \$10,000 that you charged as income to him, wasn't it? A. Yes, sir.

Q. Bank deposits and everything of that kind? A. Yes.

Q. It includes \$399? A. Yes.

Q. And the \$712.28? A. Yes, sir.

Q. And the \$1,500 item that he told you came from Mr. Powers, his uncle? A. He told me it came from Powers.

Q. That is included in the \$10,000? A. Yes.

372 Q. The \$10,000, that is made up of these items and others like them that were not explained to your satisfaction? A. He told me that the money came from such and such a place, but he did not prove it to me.

Q. That sum of \$10,000 is made up of items like that that were not explained to your satisfaction and Mr. Reighley's? A. Yes, sir, we could—

Q. That is all I want to know. You just added it up? A. Yes.

Q. If you were not satisfied you charged it as income? A. Yes.

Q. That included any deposits in the bank the source of which had not been explained? A. Yes, sir.

Q. The source of which had not been explained to your satisfaction, at least? A. To mine or Mr. Reighley's.

Q. Did Mr. Spies tell you that he had been dispossessed and that that interfered with him getting back different records or memoranda he had obtained and which he had had originally? A. No.

Q. You knew that he was dispossessed? A. I heard that he was.

Q. Weren't you furnished in April of 1940 by Mr. Spies with a statement of his income and expenses? A. April 27, 1940, the second time I saw Mr. Spies he gave me a statement in which he showed how he had spent \$38,000 which he told me he secured in 1936.

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Q. Didn't he tell you that that statement of income and expense was approximate and was as close as he could give you as to the exact figures? A. Yes, sir, he did.

Q. Didn't he tell you that he did not keep Mrs. Spies' books or stubs and the record of the family expenses, but that she did so? A. Yes, sir, he told me that.

Q. Didn't he tell you that she was not a very careful bookkeeper with respect to any money spent for household or personal expenses? A. I think he said something about Mrs. Spies not putting all the entries on the stubs.

Q. Did Mr. Spies say to you that he wanted to file a return and wanted to pay the tax in instalments? A. No, sir.

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Q. Do you remember that he told you about the job which he had obtained with the Gray Company? A. Yes, sir.

Q. And the salary, the increase of salary which he got there? A. Yes, sir.

Q. Don't you remember that he told you that he wanted to work out a smaller payment on this tax?

Mr. Behrens: I object as incompetent, irrelevant and immaterial. The action of the taxpayer once investigation is started, I think the law is clear, has no relevancy as to the defendant's conduct.

The Court: I will have to ask the reporter to read the question.

(Question read.)

The Court: Is that the ground on which you object?

Mr. Behrens: Yes. The case I have in mind, your Honor, is *United States vs. Sullivan*, in the Circuit Court of Appeals in the Second Circuit, in 98 Federal, 2nd, page 79.

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The Court: Give me that citation again.

Mr. Behrens: 98 Federal, 2nd, page 79.

The Court: Mr. Cahill, are you familiar with the case?

Mr. Cahill: I know the case. I do not recall just what it is as to the precise point.

Mr. Behrens: I have quoted here the language.

Mr. Cahill: I am sure he will quote it correctly.

The Court: Do you want to have it quoted?

Mr. Cahill: Give it to his Honor.

The Court: Yes. You do not have to read it.

(Document handed to the Court.)

Mr. Behrens: I should have given the first page which contains three sentences indicating the nature of the case (indicating).

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Mr. Cahill: It was a case in the Eastern District.

Mr. Behrens: It is in the Circuit Court for the Second Circuit.

The Court: On the authority of the case of *United State vs. Sullivan*, I will sustain the objection.

Mr. Cahill: I respectfully except.

Q. Mr. Deneen, do you remember Mr. Spies making a statement to you about \$40,000 which he received on June 11, 1936? A. Yes, sir.

Q. Do you remember that you showed him a check made out by Kenyon and he told you he never saw it until then?

A. The check made out to Donald P. Kenyon?

Q. Yes. A. Yes.

Q. You remember he said that? A. Yes.

Q. Do you remember he told you he endorsed a check for that amount of \$40,000, which he found was made out on a Jersey bank? A. He said he endorsed the check for \$40,000 on some Jersey bank—I do not remember that he said Jersey bank.

Q. Did you see the endorsement on that check, yourself, on the original? A. No, sir, I have not.

Q. He told you that he had agreed to give the man named Eddy \$2,000 out of the \$40,000? A. He told me that he gave Eddy \$2,000 in the Lawyers' Trust Company on June 11, 1936, because Eddy was staying with the Investment Trust and there was an understanding between Mr. Spies and Mr. Eddy that if Eddy ever secured bonuses from the Investment Trust that he would give the money back to Spies, and that he did. 380

Mr. Cahill: That is all.

*Redirect examination by Mr. Behrens.*

Q. With reference to the various elements or checks of the defendant, Spies, when he talked to you on April 22nd or 27th, did he say that he had been ill during 1937? A. Yes, sir, he told me that he was ill for a period of five weeks, as I recall, with sciatica. 381

Q. Did he say that he had any other disease in 1936? A. You mean 1937?

Q. 1937? A. No, sir, he did not tell me anything else.

Q. Did he say anything to you about any disease in 1936? A. No, sir.

Q. Or 1935 or 1934? A. No, sir.

Mr. Behrens: No further questions.

Mr. Cahill: That is all.

(Witness excused.)

Mr. Behrens: The Government rests, your Honor.

Mr. Cahill: I should like to make a brief argument, if the Court please.

The Court: I assume you want the jury excused?

Mr. Cahill: I guess it might be just as well.

The Court: We will excuse the jury for a short recess. I want to use as much of the time as possible.

(Jury temporarily excused.)

Mr. Cahill: May it please the Court, I renew the motion made at the opening of the case. I do not need to renew that motion. It stands. I make a motion of the same nature to dismiss the indictment upon the ground that the Government has failed to show a wilful attempt to evade and defeat the income tax law.

My point has been indicated by the language in the indictment, which states the essence of the case which the Government attempted to prove.

My point very briefly and simply and clearly is this: that the Government has proceeded along a line that we conceded. That is to say, that there was a failure to file a return for the year 1936 and a failure to pay the income tax. If there was an attempt and a failure to file, they must prove that it was wilful. My point is that if he failed to file the return and failed to pay the tax it did not make out a wilful attempt to defeat and evade an income tax.

The Court: Under 145(b)?

Mr. Cahill: Under 145(b). There is nothing either in the debates in Congress or in the expressions used in the statutes to indicate that what Congress intended when it enacted the felony statute was to put those misdemeanors in another class, that is the two failures

to file a return and to pay a tax and to make out of these two misdemeanors the felony described in 145(b).

Probably no more apt language could be used than that which I called your Honor's attention to at the beginning of the case in the decision and opinion of Judge Altschuler in the O'Brien case:

"There is no element of scheme or artifice or anything of a positive nature by which it could be established that an attempt was made by the defendant—attempt, meaning, of course, secretive more than failing to perform a duty. This statute has been evaded in nearly all instances by persons who by crooked books or deceptive records or something of a positive nature might mislead or defraud the Government by making up an income return by which he sought to evade the payment of the tax due."

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With respect to any such scheme I see nothing in the evidence, I see no affirmative or positive act on the part of the defendant. As a matter of fact, the whole transaction was done in the open, and whatever may be the explanation of the failure to file the return or to pay the tax, I think the explanation has been made clear and is clear already. I feel, however, that we are not concerned with that explanation and we are not put upon the duty of explaining the failure to file a return or failure to pay a tax, because, as I said, the addition of those two misdemeanors does not make up the felony:

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The Court: I think I have your point, Mr. Cahill. It is an important point. I do not want to treat it lightly, but I do not think that there is anything that you can add now that would strengthen that point. I would like to hear from your opponent and see what he has to say about it.

Mr. Behrens: The argument which Mr. Cahill has just made, I think, is almost completely the same argu-



ment which he made at the opening of the case. But at this stage we are faced with an apparently different problem. The question is whether there is an issue which should be submitted to the jury, whether the Government has made out a prima facie case.

The Court: That is right.

Mr. Behrens: It is clear that on a motion of this character, or in an indictment of this character, where there is a question of wilful intent, although intent is necessary, you do not open up the defendant's head to see what is inside, to see the circumstances surrounding the case. It is a question of wilfulness.

As I read the authorities of the cases, including the Circuit Court of Appeals of this Circuit, they seem to hold that a man has a substantial income if his records are incomplete or one cannot exactly explain where the income came from. If he has knowledge that there is a substantial income and it is taxable he is required to file a tax return within the district.

It is sufficient on the element of wilfulness in these cases, and we have gone much further on the question, and the Government has proved by the testimony of witnesses here—

The Court: Under 145(a) you also have to prove wilfulness.

Mr. Behrens: Yes.

The Court: I assume that your adversary, as to whether you have established wilfulness, he is willing to concede purely for the purposes of argument that you have established a wilful failure to pay. His argument is that the two do not add up to a wilful attempt to evade and defeat. I would like you to address yourself to that particular proposition.

Mr. Behrens: I think under the state of the proof as we have it now the jury would be warranted by weighing this testimony in saying that this defendant

not only had received a substantial income during that year but he had attempted to hide the receipt of about \$38,000 or \$40,000 without actually filing an income tax return. From an income tax standpoint he benefited by that \$40,000 transaction. He said that he gave \$2,000 to this man Eddy. I believe that he then stated the expenses which he had. That may be considered by the jury. The jury may read the exhibits. I believe they will find that there had been an attempt to conceal it.

The first witness' testimony we know that he would not take a check. He wanted cash. We find that the check nowhere bears the name of Spies. The name of the payee was necessary. We have the very unusual thing of the transportation of this money out to Long Island in an armored truck, and there it is deposited in his wife's bank account.

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I say this: that as a matter of argument, from the proof alone you could never say that the defendant Spies got a dime from Kenyon or anyone else or from that transaction one dollar if you did not have the oral testimony of Wayne and Loveridge and Grief at the bank. You would never be able to prove it if you go through the accounts in question of Murray R. Spies. You would never know that he got or received the \$40,000 or any other sum from Kenyon.

The Court: That is not conclusive.

Mr. Behrens: That is not conclusive at all. But the whole transaction as established here shows it is humanly impossible to prove it without oral testimony. If you did not have the testimony here you could never prove this man got \$40,000. It would seem to me that this issue of unexplained bank deposits is very important to the issue of wilful intent to evade.

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Take the man's background as an attorney, associated in the investment trust field. Here he is with an

estimated income of over \$40,000 in that year, with an income gross under \$10,000 in various accounts, giving him three different efforts to explain where it came from. I direct your attention to the fact that there is another occasion which we never looked at before, and the jury would be warranted in finding from the letter in which he says, "I enclose my check for \$399"—I say to counsel that even withdrawing that \$399, I say I am not completely satisfied that we have had all of the bank accounts in which he is interested.

The Court: You need not pursue it. Motion denied.

Mr. Cahill: I do not concede he wilfully failed to file a return or wilfully failed to pay.

The Court: I understand that. You never have conceded that. You have conceded it, as I understand it, a failure to file and a failure to pay?

Mr. Cahill: Yes, sir.

The Court: You have not conceded the commission of the crime?

Mr. Cahill: Yes.

The Court: The defendant would have to plead guilty to another crime.

Mr. Cahill: That is the situation as to another count.

The Court: If the jury were here, he might do it otherwise.

Mr. Cahill: I wish to call your Honor's attention to just a few facts to show that there was no scheme to conceal income. That could not be said on any hypothesis, when he gave the Government notice or applications for two extensions, and gave them notice that he was a substantial taxpayer. Naturally he did that when this tentative return was filed by the accountant. On the facts no man who was seeking to hide the fact that he had a taxable income would put himself on record in that fashion.

Furthermore, the concealment was the most artless kind, which was to put in some place \$38,000, placing the money in his wife's name for safekeeping. Usually in some charge similar to this the concealment would be kept from everybody. That is almost a universal practice. Here it was put in the name of Marie V. Spies in the old account and in trust for the children. He did not go to some third person to hide the proof. It probably was an unusual thing to ship the cash, the disposition of it on his part when he asked that the cash be transported in that way.

The Court: That, Mr. Cahill, is a very substantial argument to the jury. But I do not see that it has any bearing on the question here. On the basis of the proof so far submitted the jury would be warranted in drawing an inference of attempted evasion. I think it should go to the jury. I am not passing on the issue or on the question. 398

Mr. Cahill: My reason in discussing the facts, and I had only one discussion, is to get the picture as a whole. My point is that there is no set of circumstances from which an inference of concealment or the positive acts by which the Government would be kept from getting its income can be drawn—there is no set of such circumstances in the case, taking it as a whole.

The Court: I think we can go on until 4.30.

Mr. Cahill: Yes: Exception.

The Court: Will you have the jury brought back? 399

(At this point the jury return to the court room.)

The Court (addressing the jury): I want to caution you not to draw any inferences from any rulings that I have made on motions. I was passing on questions of law which are outside your province. Just the questions of fact are exclusively within your province. I ask you therefore to pay no attention to any ruling I may have made on motions or admissibility or non-admissibility of evidence.

## DEFENDANT'S CASE.

MURRAY R. SPIES, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

*Direct examination by Mr. Cahill.*

Q. There is another Murray Spies in New York City, isn't there? A. Yes, sir, there is.

Q. Where were you born and when? A. York, Pennsylvania, September 28, 1901.

Q. Are you a married man? A. Yes, sir, I am.

401 Q. Have you a family? A. Yes, sir, two children.

Q. When were you married? A. July 23, 1922.

Q. When did you say you were born? A. 1901.

Q. Were you educated in New York? A. Yes, sir.

Q. In the public schools here? A. Public schools and night class and St. John's College and School of Law at night.

Q. Before you went to law school what was your occupation? Give it to me briefly? A. I was a secretary for Mr. Reed B. Dawson, counsel of the Medical Society.

Q. Were you in an office before that? A. Yes.

Q. In what office? A. Elihu Root.

Q. Did you meet Mr. Dawson there? A. I did.

Q. And he asked you to become his secretary? A. Yes. I left the Root firm in 1922 and went with Mr. Dawson.  
402 He was going out to practice for himself, and I became his secretary.

Q. Did you remain with Mr. Dawson for some time? A. I remained with Mr. Dawson until 1932 or 1933, about eleven years, as I recall.

Q. Did you study law? A. Yes, sir, I did, from 1927 until about 1930.

Q. You were admitted to practice in this State? A. Yes, sir.



Q. You are now a member of the bar of New York? A. I am.

Q. In 1933 I believe you said you left Mr. Dawson? A. I believe it was 1933.

Q. What did you do then? A. I went into practice with a couple of lawyers under the firm name of Jones, Spies & Taylor.

Q. Were you in general practice? A. Yes, sir, I would say so, Mr. Cahill.

Q. Did you enter upon some business about 1933? A. In 1933 I became associate counsel to a corporation known as Universal Shares. It was headed by a man named Espey whom I met in the office of Reed B. Dawson, as a client of Mr. Dawson, in the latter part of 1932. 404

Q. Did you in November, 1933, assume some office with respect to a trust? A. Yes, sir, in 1933 under a trust indenture prepared by John F. O'Ryan, a lawyer.

Q. Is that General O'Ryan? A. Yes, sir. I became voting trustee with another individual by the name of Eddy.

Q. From 1933 to 1936 what was your employment? A. I was working and practicing individually but devoted a great part of my time to the investment trust program.

Q. Will you tell us what you mean by investment trust program? A. It was a series of companies for which General O'Ryan and I were acting as counsel. He, I believe, went on until 1934 as counsel and as trustee until 1936. It involved the purchase or sale of the interests in securities either listed on the Big Board or otherwise felt desirable for purchase. 405

Q. Did you have any control over the investments? A. No, sir, I did not.

Q. What was your end of that business? A. Primarily that of a legal nature.

Q. Mr. Spies— A. Mr. Cahill, I want to correct that. I think in one or two smaller companies I was director and

as such had a voice in the management of the securities in these smaller companies.

Q. Mr. Spies, have you been in ill health at any time during this period as to which you have testified? A. Well, I would say that in 1936 and 1937 and into the early part of 1938 I believed I was in very serious ill health.

Q. Did you apply to any insurance companies for life insurance? A. Yes, sir, beginning in 1931 on the first rejection by the Prudential Life Insurance Company, all told I would say seven or eight different companies and in most every case was rejected. I think in every case I was rejected except one, rated up nine or ten years.

407 Q. Were you ever told the reason for your rejections? A. I learned—I was told in one or two instances and learned in practically all other instances up until 1936 that the reason was a heart condition of some kind and a rapid pulse, high blood pressure, vertigo and other symptoms such as those.

Q. Did you ever hear any suggestion of a coronary heart disease? A. Yes, sir, in February or March of 1937 I was told that my application for insurance with the New York Life which I made in the early part of 1937 was rejected—refused and that the examination suggested coronary thrombosis.

408 Q. How many physicians have you consulted and been treated by in the years from 1931 on? A. I do not know how many from 1931 on, Mr. Cahill, but from 1936 on I would say it would be twelve to fifteen physicians.

Q. Can you give us the names of some of the doctors who treated you? A. Yes, sir, I could. There was Dr. Dery, D-e-r-y, Dr. Watson Davidson, Dr. Baretz, B-a-r-e-t-z, Dr. Phelps, Dr. Sharpe, S-h-a-r-p-e, Dr. Levis, L-e-v-i-s, Dr. Michalover, M-i-c-h-a-l-o-v-e-r, Dr. Rosen. That are all I can remember right now, Mr. Cahill.

Q. Speaking about Dr. Rosen, did you try to get in touch with him in the last few days? A. Yes. He is on a vacation and will not return until the 25th of August.

Q. Now, Mr. Spies, did you have any attacks of illness in your office during 1936 and 1937? A. Yes, sir, I had quite a few of them.

Q. Would you describe what happened? A. Well, each time I thought I was going to die from a heart attack and either laid down or would go home or call a doctor. On two occasions I know I called, two or three occasions, we had a doctor come over to the office, an emergency call.

Q. Did you conduct business sometimes while you were feeling ill? A. Yes, sir, I would try to conduct my business.

Q. Under what circumstances? A. Lying down on the couch.

Q. Were any emergency calls made to hospitals? A. Yes, but that goes back to 1932, I believe. 410

Q. I am not going into that. I am directing my attention particularly to 1936 and 1937 for the moment. Did you have any fear of any kind at that time, Mr. Spies? A. Yes, sir, particularly after I heard about coronary thrombosis I would say that my fears were made up of falling out of my chair and managing to get up and would manage to go to bed. Although I did get to the office on occasions, I thought my next breath would be my last and my next step would be my last.

Q. Will you tell us about that, please. A. I realized or at least believed that coronary thrombosis was a very fatal disease and most of time, at least, I believed that I was going to die from it or was going to have a stroke or some other form of disease connected with coronary thrombosis. I had heard so much about it that I believed I was going to die. 411

Q. Did you have any fears with respect to any of your daily experiences? A. Well, I remember I would not go into subways. I was afraid I was going to jump out of windows. I constantly rode in taxicabs for fear of those things.

Q. Where were you living during that time, during that period? A. I was living in Eastern Parkway and Rockville Center.

Q. Did you use the subways at the time? A. Practically never.

Q. Did you go into restaurants for your meals? A. No. During that period I was very reluctant to go into restaurants and very seldom did. As a matter of fact I would offer to stay out in the car while Mrs. Spies and guests were forced to go into restaurants, thus leaving me out in the car. I had an aversion to going into places with a lot of people.

413 Q. You did drive your own car? A. Yes, that was one place where I could relax.

Q. Did you tell these fears to your physicians? A. I told them, yes, sir, to the ones fairly close to me. I was a little bit hesitant to tell it to others, because I was afraid they would think I was actually crazy.

Q. Did you tell that to Dr. Gillman? A. I did.

Q. To Dr. Sharpe? A. Yes, sir.

Q. Did Dr. Gillman treat you for several years? A. He did.

Q. Did he give you medications, or what kind of treatment? A. He gave me medications. It was some sort of sedative, bromides or luminal, or things like that.

414 Q. During June, 1937, did you have a period of illness at home? A. Yes, on June 3rd or 4th I was stricken with sciatica and was confined to bed from June 4 to June 24.

Q. That was in 1937? A. Yes, sir.

Q. What was your next period of confinement at home? A. That confinement ran substantially from June 4 to September or the latter part of August. Then I was out of bed on three or four occasions, perhaps more, during that time.

Q. Did you go into the office sometimes? A. Yes, sir. I did.

Q. Do you remember the prescription of a book by any of the doctors? A. In 1938, the early part of 1938, Dr. Sharpe prescribed a book called "Fear", by, I believe it was, Rathbone Oliver.

Q. Do you have a copy of the book? A. No, sir, I do not have it with me.

Q. Did any of the doctors tell you that you were not suffering from heart disease or the other diseases you thought you had? A. Yes, most of them told me I was not.

Q. Do you remember the date, June 11, 1936? A. Yes, sir, I do.

Q. What occurred on that date? A. In June I believe we signed a closing statement which has been introduced in evidence by the Government in which it was provided that the sum of \$40,000 was to be paid to me for my resignation as trustee and for whatever interest or claims I might have had against the various companies, and the same day General O'Ryan resigned. We all got out as trustees on that date. 416

Q. What did you resign from? A. I was a voting trustee for one or more of the distributing companies, not of the investment trusts themselves.

Q. Was one of the management companies which you managed an investment trust? A. Not an investment trust. We managed it outside as an independent investment counsel organization, as to such administrative work. We would talk one day and I would receive the approval of the management to vote and the commissions distributing the trusts orders. 417

Q. Did you have a contract by which you were entitled to fees on the purchase and sale of securities? A. No, the company had an arrangement with the investment trusts by which to receive 1/360th of 1 percent of the total face value of the fund each day. I think we assigned part of it to outside independent investment counsel and the company also had the right to distribute the shares on which



it made commissions. I had an arrangement with the distributing company as counsel.

Q. When you speak of distributing company, what do you refer to? A. One was United Sponsors. One was the United Standard Oil Shares.

Q. Which securities did they distribute? A. They distributed the shares of the investment company, of the United Standard Oil Company of America.

Q. You say you had an arrangement or a contract by which you were entitled to certain commissions in that connection, is that right? A. As an individual?

Q. Yes. A. Yes, sir.

419 Q. When you made this arrangement by which you received the \$40,000, what did you give up in consideration of that? A. I gave up the contracts and whatever claims I had for commissions which I had in the affiliated companies, and whatever other rights I might have had in the business of the company.

Q. Was this the biggest transaction of your life? A. By far.

Q. You never had any other involving anything nearly as much as that? A. No, sir.

Q. In compensation or income, did you? A. No, sir.

Q. Do you remember just before June 11, 1936, any period of illness or anything of that sort or to that effect?

A. I think it was on June 6th. I had one of these fear attacks and Dr. Sharpe of 120 Broadway was summoned on  
420 an emergency call to treat me. What he did I have forgotten. I think it was a sedative of some kind. It may not have been any.

Q. Did you feel weak or nervous? A. Yes, I seemed to have the symptoms of a heart condition.

Q. Did you tell that to Dr. Sharpe? A. Yes.

Q. Did you speak at all about closing the \$40,000 transaction, which was approaching? A. I did. I told Dr. Sharpe that I did not think I was going to be able to go through with it because of the way I felt.

Q. What did he tell you? A. I think he told me that I was all right and that I could go through with it.

Q. You did go through with it? A. Yes, sir.

The Court: Mr. Cahill, I think this is a good time to stop. The jury will be excused until 11.30 tomorrow. I will ask the jurors to consider that we may sit tomorrow to a later hour than today in an effort to close this matter, especially since we have work to do on the calendar before you arrive. Plan to be here until at least 5 o'clock tomorrow.

(Adjourned to Tuesday, August 12, 1941, at 11.30 o'clock A. M.)

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New York, August 12, 1941;  
11.30 A. M.

### TRIAL RESUMED.

MURRAY R. SPIES resumed the stand.

*Direct examination (continued) by Mr. Cahill.*

Q. Mr. Spies, I direct attention again to June 11, 1936. I believe you testified that you consulted Dr. Sharpe and then proceeded to close that transaction? A. Yes, sir.

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Q. Will you tell us just what occurred at the closing when you got that \$40,000? A. I believe Mr. Wayne and probably Mr. Dizer and perhaps one other individual and I went to the Lawyers' Trust Company. I had the closing papers in my possession, which I was supposed to turn over to either one of these three gentlemen upon receipt of the cash after the endorsement of the check by me.

We went over to the Lawyers' Trust Company and had some transaction with that company. I delivered the

papers which severed my association with the various companies and a check for \$40,000 was submitted to me, which I immediately endorsed and the cash was handed over to me. Of the \$40,000 I delivered \$2,000 to Mr. Eddy.

Q. A check to the order of Donald P. Kenyon has been introduced in evidence. For the moment I do not recall whether or not it was stated that that check was for \$40,000, but it was used in the completion of that transaction. Did you ever see that check for \$40,000 to the order of Donald P. Kenyon? A. I do not believe so, Mr. Cahill.

424 Q. According to your best recollection did you have anything to do with that check? A. No, sir.

Q. You have said that there was a check for \$40,000 used on that occasion. To whose order was that check drawn? A. It was made out to my order.

Q. Is that check, by the way, among our papers? A. No, I think that is a check that Mr. Reighley testified to yesterday was with the S. E. C.

Q. I think we were given a photostatic copy by Mr. Behrens yesterday. A. Of the face.

Q. That was a check to whose order? A. To the order of Murray R. Spies.

Q. The exhibit that we saw was for the face of the check only? A. Yes, sir.

426 Q. Was that check endorsed? A. Well, I do not know whether it was, the check, or not, Mr. Cahill. I think I saw the complete check, the back and the front, but there was a check for \$40,000 made out to my name and endorsed by me at the request of the other parties before I received the cash.

Q. After endorsing that check, what did you do with it? A. I delivered it—the party who handled it.

Q. Who was that party? A. Either Mr. Wayne or Mr. Dizer, as I recall it.

Q. After you had endorsed and handed over that check, what happened? A. The cash was given to me, and an arrangement having previously been made to take money out to Lynbrook in an armored truck—

Q. Before we get to that, did you make any statement with regard to your preference of cash? A. Yes, I said I wanted the check cashed because it was a Jersey bank, as I recall it, and I delivered the papers. I was delivering the closing papers, so I wanted cash.

Q. You knew nothing about the responsibility of the person who drew the check, I presume, did you? A. Yes, we checked Mr. Kenyon very thoroughly. As a matter of fact I found that he was a man of some substance.

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Q. With respect to your wish for cash, what was that based on?

Mr. Behrens: I object to it.

The Court: Sustained.

Mr. Cahill: Exception.

Q. Have you ever had a \$40,000 transaction before in your life? A. No, sir.

Q. Did you make arrangements for the armored car? A. I do not remember, Mr. Cahill, whether I did or the bank did.

Q. Were they made at your request? A. Yes, sir.

Q. And in your name? A. Yes, sir.

Q. You paid for the transportation of the money? A. 429 I did.

Q. After the money was taken to Lynbrook, what was done with it? A. It was taken to Lynbrook and deposited in the account of Marie V. Spies, in trust for Murray Robert Spies, Jr., my elder son.

Q. It remained there for a time? A. A very short time.

Q. What did you do with part of it then? A. I split it up into six or seven accounts in order to obtain the benefit

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*Murray R. Spies--Defendant--Direct.*

of the Government banking insurance, which I believe was a maximum of \$5,000 for each account.

Q. All of the accounts? A. No, each.

Q. You placed this money in the family name, in the name of Spies? A. Yes, every account was in the name of Spies.

The Court: I should tell you that I sustained the objection because of form. I do not mean to indicate that I regard the line of questioning as irrelevant. I assume you thought otherwise, because you dropped that line of questioning.

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Mr. Cahill: Thank you for that information, your Honor. I may come back to that question. I think I will pass that for the moment in order not to lose my line of thought.

Q. Did you invest part of that \$38,000 in anything? A. Yes, sir, we invested \$25,000 of it in an annuity in my name with the Equitable Life Assurance Society, in July or August of 1936.

Q. Was there any provision for the benefit of your wife and children in that annuity? A. Yes, sir, I believe the original annuity ran to the benefit of my wife and two children.

Q. After this transaction on June 11, 1936, did you make any more money during that year? A. No, sir, I had no income whatever.

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Q. Had you done any law practice prior to that time, June 11, 1936? A. During the year 1936 I was exclusively engaged with the companies from which I resigned. On June 11th I had my office there and was an employee of those companies and received all my income from those companies. By way of salary, each, I think, gave me a check of \$2,500 to \$3,000.

Q. You have not the exact figures at hand? A. No, sir.



Q. You have no memorandum on which you could make the exact calculation? A. No, sir, I have not.

Q. There has been reference here to the sum of \$10,000 of additional income over and above the \$38,000 which you received on the June 11th transaction. Do you know anything and can you give us any facts with respect to that alleged additional income of \$10,000-odd? A. As I recall it, Mr. Cahill, there was not 1 cent of that—that was income. I received around \$2,100 that I received from Mr. Powers, my brother-in-law, in the early part of 1936 for investment because I recommended certain securities to him as a good buy.

Q. How much did you say? A. Around \$2,100. The others were merely transfers from one bank account to another. On many occasions good friends of mine who had no bank accounts of their own and other people gave me \$20, \$30 and \$40 to deposit in my account. I, in turn, would issue checks to them or to their creditors. 434

Q. Do you recall, for instance, a check in January, 1936, January 5, 1936, of \$34.80, made up of two items, one of \$13.80 and the other \$21 payable to the order of Joseph Rychards? A. Yes, sir, I do.

Q. I believe this agent included this in income and it was referred to as income. What is the truth with respect to these checks? A. These checks were checks which were issued to Mr. Rychards in return for cash which he delivered to me so that he could pay bills with those checks. 435

The Court: How would they be income, explained items of income?

Mr. Cahill: It is included in the \$10,000 sum, I understand.

The Court: You testified to a withdrawal of that amount of money, not a deposit of that amount of money.

Mr. Cahill: It is a deposit which I referred to as a withdrawal.

A. (Continued) Deposited and then a withdrawal, deposit of the cash from Mr. Rychards and the checks by me at his request. Two checks payable to him, which were used by him, as I told you.

Q. We have got a deposit of \$32 in January of 1934 in the Underwriters Trust Company. The item of \$32 consists of two checks, both payable to S. J. Taylor, each in the sum of \$16. What do those checks represent? A. Mr. Cahill, may I look at them? They are in that red folder of mine. I think I now refresh my recollection.

437 Q. (Handing to witness) Look at the photostatic copy of that check. A. I do not believe I took that, Mr. Cahill, unless I put it in this other folder. Here is the one you were looking for (handing to Mr. Cahill). I have that, Mr. Cahill.

Q. What does that deposit of \$32 making up those two checks represent? A. These represent the issuance of two checks by me to Mr. Taylor of \$32, which he delivered to me for deposit in my account, specifically for this purpose, and one of which he used only to pay his own savings account or mortgage account at the Atlantic Savings & Loan Association. These two items, with the one of \$32 were the items which Mr. Reighley charged as income.

438 Q. It has been stated on, I believe, direct examination and probably cross-examination by the witness Deneen that he gave you an opportunity to explain these items of alleged income making up the sum of \$10,000 or more. Will you tell us just what occurred between Mr. Deneen and yourself with respect to the explanation of that alleged income? A. Mr. Deneen called me. I was working in Hartford at the time, with the Gray Manufacturing Company, and I was called to New York and attended a conference with Mr. Deneen at the Federal Building, I believe, and he

had probably three or four score sheets of analyses and summaries which he and Mr. Reighley had prepared of these accounts. There were some items which totaled \$10,000 which he could not specify himself, I think, your Honor, net income. Included among them were these two and others that you described yesterday. He gave me a list of them and asked me to check them.

I told him that none of the \$10,000 was income; that it was all proceeds from one account or another to another account and transactions such as these. I told him I would take them away and see what I could do, and discuss them with Mrs. Spies. That was about all I was able to do because in every month I would use my individual account and every month or two or three weeks go to the bank to check the statements and bank accounts. So I gave a short summary of it to Mr. Deneen and Mr. Reighley. Of course, knowing they were not income, I felt that eventually it would be explained to the satisfaction of Mr. Deneen and Mr. Reighley, and if they found as they thought that there was any other source of income I would let the matter ride.

On another occasion when I had a column of seven items I asked Mr. Reighley, Mr. Deneen and Mr. Whearty for access to some of the books of United Sponsors. Mr. Deneen turned to Mr. Whearty, who was the United States Attorney in charge of the former trial, and asked him if it would be all right, and the result of that short conference was the books were not made available to me on the statement that the Government did not feel it ought to disclose its case in advance. With that attitude I stopped attempting to make any check.

Q. With respect to the United Sponsors, Mr. Spies, there is in evidence a page from the ledger of that corporation headed "Notes Payable". Was there a note given to you or Mrs. Spies by that corporation? A. Yes, sir, there was a note of \$8,440, as I recall the figure, delivered by the company to Mrs. Spies.

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Q. What was the consideration for that note? A. I believe she advanced in cash or check, probably check, in December of 1935 approximately somewhere between \$5,000 and \$6,000, and wanted her to make a one-note transaction, and had Mr. Hillyer, who was also in the employ of me with United Sponsors, advanced another \$2,000, and on completion of the advance there was a one note which the company signed and delivered to me for Mrs. Spies.

Q. Was any part of the consideration money due you salary, do you know? A. No, sir, that was all loan.

Q. Did you explain that to Mr. Deneen and Mr. Reighley? A. Yes, sir, and I believe I showed them a letter which I had from United Sponsors indicating \$8,440 as the amount of the loan, although I am not sure whether I showed it to them or not.

Q. You severed all connections with Universal and United Sponsors on June 11, 1936? A. I did.

Q. Did you ever go back there? A. Yes, sir, I went back there, I believe, once in 1937 at the request of the Collector of Internal Revenue's office to check figures of income of mine. We stayed up at the United Sponsors' office for about fifteen or twenty minutes.

Q. You do testify that you received some money from Mr. Powers for investment. I think you said you received \$2,100. Do you recall an item of \$1,500 about which we have had some testimony? A. Yes, sir, I remember it very well.

Q. I believe that item has been referred to as income. 444 Will you tell us what that referred to? A. Mr. Powers—shall I go into detail on that, Mr. Cahill? I will try to make it short.

Q. If it is not too detailed. We want to get merely the facts.

Mr. Behrens: As to the source of that income, I think I should object to the form of the question. I suggest that the testimony be in question and answer

form rather than in the form of a recital of a long story.

The Court: I will let counsel ask his questions in his own way. If the answer calls for a story, if the question is not otherwise objectionable, I will permit him to tell the story.

A. In December of 1935 an associate of mine with the United Sponsors came to the office and told me that he had read or seen in the newspaper a very favorable report on a security issued by the Hygrade Food Products Company. At the time there was a question of the refunding of some A.A.A. taxes. I do not know what it stands for myself. I think it has something to do with the Agricultural Adjustment.

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The Court: Agricultural Adjustment Act.

Mr. Cahill: Yes.

A. (Continued) And he came in quite enthused about it and told me it looked very good. And Mr. Powers knowing that I was downtown had told me that if I heard of anything good to let him know. This friend of mine, Mr. Kahlback, suggested that it might be a good purchase. I immediately got in touch with Mr. Powers and told him that I thought it was a good buy, that I was going to buy some, and if he wanted to come in. He said yes, he would come in and put up \$1,500.

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Q. Did he give you the \$1,500? A. Yes, in January, 1936 he put up \$1,500, and I wrote a letter acknowledging receipt in 1936.

Q. What did you do with the \$1,500? A. I deposited it in the Underwriters Trust Company, in my account.

The Court: We will suspend until 2:15.

(Recess until 2.15 P. M.)



(AFTERNOON SESSION.)

2.15 P. M.

MURRAY R. SPIES resumed the stand.

*Direct examination (continued) by Mr. Cahill.*

Mr. Cahill: Was my exception to the denial of the motions to dismiss noted?

The Court: If it is not, it will be.

Q. Mr. Spies, you testified as to some checks which you  
449 cashed for Mr. Rychards; you testified to them this morning. I show you two checks, one for \$21 and another \$13.80. What date is that? A. Each is dated January 3, 1936.

Q. Are those the checks to which you referred? A. Those are the checks which are issued to Mr. Rychards for the cash he gave me.

Mr. Cahill: I offer those two as one exhibit.

Mr. Behrens: I have no objection to these either, your Honor.

The Court: Mark them C-1 and C-2.

(Marked Defendant's Exhibits C-1 and C-2.)

Q. Now I show you two other checks to the order of  
450 S. J. Taylor, dated January 28, 1936, each for \$16; one is the 25th and one is the 28th of January. Are those the checks to which you referred when you testified this morning about having issued checks for cash to Mr. Taylor?  
A. Yes, sir.

Mr. Cahill: I will offer those in evidence.

Mr. Behrens: I have no objection to these either.

(Marked Defendant's Exhibits D-1 and D-2.)

Q. Mr. Spies, after you received this \$38,000 in June, 1936, did you do any business during the remainder of the year? A. No, sir, I did not. I helped—there was a client of mine who organized a small company of his own for which I acted as counsel and received no fees.

Q. In March or April of 1937 did you become interested in any other corporation? A. In February, I believe, of 1937, I became interested in National Fund, a company which was organized a couple of years before by other parties and then in our own investment program that we had started in December of 1937.

Q. Did you enter into any agreement to invest any part of the \$38,000 in that corporation? A. In April of 1937 452 either I, or Mrs. Spies and I, undertook by agreement to advance at least \$11,000 to a joint program which was being carried on by National Fund and the First Mutual Corporation, on the condition that National Fund would also contribute an equal amount.

Q. Was that a closely held corporation? A. First Mutual Corporation was closely held. No stock was ever sold to the public.

Q. Did you subsequently put some money into the corporation? A. Yes, we put up \$11,000, as agreed.

Q. Did you take it out of the \$38,000 you had received? A. Yes, sir.

Q. What was the amount of your total investment in that corporation? A. I would say it ran between \$15,000 and \$20,000. 453

Q. Was that all made during the year 1937? A. During the year 1936—the investment you mean?

Q. Which year was it made? A. What year I made the investment?

Q. Yes. A. They began with the organization expenses of the company in December, 1936; a small advance in December and then the remainder in 1937, up to about, I would say, July.

Q. In 1937, Mr. Spies, did you become ill? A. Yes, sir, from June 3rd, 4th or 5th.

Q. What was your trouble, if you know; what were you suffering from?

The Court: We have covered that already.

Mr. Cahill: Maybe we did. I think perhaps we did.

The Court: He was sick with sciatica.

The Witness: That is correct.

Q. Let me ask you this: How long were you confined on that? A. The first distinct attack started either June 3rd, 4th or 5th, and lasted until the 24th of June.

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Q. In July did you borrow any money on your annuity? A. Yes, sir, I did.

Q. Did you come out for that purpose? A. I got out of bed for the purpose of putting up the \$11,000 that I had agreed to put up in April of 1937.

Q. Did Mrs. Spies go with you? A. Yes, she did.

Q. How much did you borrow on the annuity then? A. I think we borrowed \$12,000 or \$12,500.

Q. Did you go to the office on that transaction? A. I do not believe so, Mr. Cahill.

Q. What did you do after you delivered the check to them? A. I went back home and went to bed.

Q. During July, August and September of 1937, where were you? A. A substantial part of these months I was 456 confined to the house.

Q. Did you visit the office sometimes? A. Yes, sir, I did.

Q. Did you buy a house during the year 1937? A. Yes, in August or September of 1937.

Q. Was there a foreclosure of that house subsequently? A. Yes.

Mr. Behrens: I object to that as immaterial.

The Court: Sustained.

Mr. Cahill: On the question of intent or wilfulness.

Mr. Behrens: If this happened, let's say, in 1937, or if it can be tied into some period of time closely associated with this, I withdraw my objection. But I happen to know the circumstances. It is far remote.

Mr. Cahill: I will tie it up. It is not just a question when any proceeding may have been terminated, but what was done with the money. On the question of wilfulness and intent I think it would be pertinent.

Mr. Behrens: That has nothing to do with the question that was asked, what was done with the money.

Mr. Cahill: That is part of it.

The Court: To show that this defendant used some money to buy a house? 458

Mr. Cahill: Yes.

The Court: I do not understand the relevancy of the succeeding question.

Mr. Cahill: I want to show what became of these amounts on deposit, on the question of wilfulness.

Mr. Behrens: I think that would have to be something that took place on or about June 15, the date of the alleged crime other than something that would take place in 1938 or 1939.

The Court: I will allow the question and see how far afield we go.

Q. How much did you invest in that house? A. It was between \$4,000 and \$5,000. 459

Mr. Cahill: What was the last question? I believe your Honor has allowed it.

The Court: What happened to the house after that.

Mr. Cahill: That is right.

Q. What happened to the house? A. In 1938, I believe, foreclosure proceedings were instituted and carried through

until 1939, when I was compelled to borrow some money from a friend of mine to save it. And then we rented the house.

The Court: You rented it out or for your use?

The Witness: We rented it out to someone else, your Honor.

The Court: I think we are going pretty far afield.

Mr. Cahill: I won't follow that any further. I guess we would get far afield if we went any further with it.

The Court: The mortgage had not been foreclosed at least in 1938?

The Witness: I assigned it to the party who loaned the money to me.

The Court: Subsequently?

The Witness: In connection with the loan that he advanced to me, your Honor.

Q. Did you talk to Mr. Deneen or Mr. Reighley or any other representative of the government about any plan to pay the taxes on your 1936 income?

Mr. Behrens: I object, your Honor. I can not see that there is any point to it at all.

The Court: Will you read the question, Mr. Reporter?

(Question read.)

Mr. Behrens: I think we come right back to the Sullivan case. That is a question of cooperation and is long after and does not bear on his intent on the date it is alleged he attempted to defeat and evade the tax.

The Court: I will sustain the objection.

Mr. Cahill: I take an exception.

Q. Did you tell Mr. Deneen and Mr. Reighley where you were employed? A. I did.



Q. When was that? A. That was in 1940, I believe, in April.

Q. Did they discuss your salary with you?

Mr. Behrens: I object to that as immaterial.

The Court: Did they discuss his salary with him?

Mr. Behrens: Yes, in 1940.

The Court: Salary as of when?

Mr. Cahill: As of that date.

The Court: I sustain the objection to that.

Mr. Cahill: Exception.

Q. Did you consult Mr. Rosenberg about your income for 1936? A. Yes, sir.

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Q. When did you go to Mr. Rosenberg? A. I believe it was in the early part of 1937.

Q. He was an accountant, was he not? A. Yes.

Q. What did you say to him about the income? A. I told him the approximate amount of money I had earned during 1936 and asked him to compute the taxes, estimate it, and while I was on the telephone with him he gave me an estimated figure on the tax, and I told him to do whatever was necessary to get an extension, and he said that he would.

Q. Did you give him a reason for getting an extension? A. I think at the time I told him that I was feeling poorly and that I was going away.

Q. Did you go out-of-town? A. I believe I did and remained there a short while, Mr. Cahill.

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Q. What month was that? A. That was in the month of February or March, 1937.

Q. Did he report to you that he had gotten an extension of time to file your income return? A. I believe so.

Q. Did he discuss with you the filing of any tentative return? A. Yes, he did. He said he believed that the tentative—that it was necessary to file a tentative return, and I told him to do whatever was necessary to effectuate it.

Q. Was a tentative return drawn? A. Yes.

Q. Did you sign it? A. I do not believe so. I do not believe I saw it until the other day in this court room.

Q. Did you discuss with Mr. Rosenberg any books or records from which your taxes might be computed? A. Yes, sir; I told him that I did not have the books available, that I would have to go through Mrs. Spies's accounts, which were kept very poorly, and that the books of United Sponsors were not available to me and that I was feeling ill anyway and I was not ready with the figures.

Q. How long was that extension that was granted you, if you know? A. I think the exact date was about April 15.

467 Q. Did you ask Mr. Rosenberg to get another extension for you? A. Mr. Cahill, I do not know the exact date or whether I did it myself, but I know one was obtained.

Q. Extended to when? A. June 15.

Q. Did you yourself communicate at any time with the Customs House about the matter of extending your time to file a return? A. Yes, sir, on two occasions.

Q. Will you tell us when those were and just what you did? A. On May 15 I wrote a letter—I think it was May 15, 1937,—I wrote a letter to the Custom House saying that I was not able to contact the accountant and that I did not know whether he had filed the return or not, just wanted to let them know that I wanted to protect myself on the extension.

468 In September or October of 1937 I telephoned the Custom House and got a young lady on the telephone and asked her to please get my file, which she did. I asked her to note on the file that I expected a sum of money which would enable me to file my return and pay my tax within a month or so. She said she would note it, and that was the end of that conversation.

Q. Did you at any time go to any brokers to secure information as to transactions in the brokerage accounts? A. Yes, sir, in the early part of 1938; I believe it was March or April, I wrote to two or three brokerage firms for the

data in connection with any accounts in my name and Mrs. Spies' name or Mr. Powers' name and asked them to note the information in connection with matters required by the Federal Government.

Q. Were you referring then to the income report for 1936? A. Yes, sir.

Q. Was that before or after Mr. Reightley and Mr. Deneen paid a visit to you? A. That was over a year before I saw anyone in connection with this matter from the Federal Government.

Q. Did you at any time send to the Custom House for forms for the 1936 tax report? A. Yes, sir, in 1937 I sent out for the 1936 returns and obtained them.

Q. The date you sent to the Custom House for these forms, did you have any business transaction? A. Yes, I had a matter on with an individual who was ready to put up or contributed some additional working capital for the companies which would have released funds to me with which to pay the income tax.

Q. Did the time come in the year 1937 when you had none of the \$38,000 left? A. Yes, I think by the end of December, 1937, the greater part of that \$38,000 was completely gone.

Q. What happened to this company in which you made the investment? A. Well, in the end of 1937 the market had declined to such an extent that the possibilities for the business were not very good and shortly after 1937 the directors around whom we were building the company resigned and there were other resignations and the prospects for that company were about over.

Q. Was that the end of the company's business or attempt to do business? A. To all practical intents and purposes, yes, sir.

Q. Was it after that that you went to work as stenographer for the Grey Manufacturing Company? A. Yes, considerably after.

Q. Mr. Spies, I believe you testified that all of this money, the \$38,000, was put in bank accounts? A. Yes. Originally it was put in the name of Marie V. Spies in trust for Murray Robert Spies, Jr., in the old account in the Lynbrook Trust Company. That was in June, 1936.

Q. Then you put it in other accounts? A. It was the purpose to obtain the benefit of Government insurance up to \$5,000 on each account. We split it up into five or six accounts in the family name, either my wife's name or the children's name. I think as a matter of fact, Mr. Cahill, one or two of those accounts were put in my name.

Q. Did you have a safe deposit box? A. No, sir, never.

473 Q. Did you ever put any of the cash away in any box or put it in the house or anything like that? A. No, it all went right through the bank.

Q. Do you recall the voting trust agreement of June 10, 1936? A. That is the closing agreement.

Q. The closing agreement, rather.

The Court: Is that in evidence?

Mr. Cahill: No, I may put it in evidence.

Q. The closing agreement of June 10, 1936? A. Yes, sir, very well.

Q. Was it on the basis of that agreement that you got the \$38,000? A. Yes, sir.

474 Q. Did you give that closing agreement at any time to any agency of the Government? A. I did.

Q. In what year? A. In April of 1937.

Q. To what? A. I delivered it to the Securities and Exchange Commission at 120 Broadway, New York City.

Q. Is this the letter you received from them? A. Yes, sir, it is.

Q. With the agreement? A. Yes, sir.

Mr. Cahill: I offer these papers as one exhibit.

Mr. Behrens: I have no objection to these either, your Honor.

(Marked Defendant's Exhibit E.)

Q. Mr. Spies, you testified about a check for \$40,000 made to your order, presented to you on June 11, 1936. I call your attention to this Exhibit B for Identification and ask you whether you can tell us whether that is a check given to you on that occasion or not? A. Mr. Cahill, I cannot, because that does not have the endorsement on the back, you see.

Q. Was the check on the face of it a check like that? A. I believe so.

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Q. Can you identify it by the signatures, if you can tell us? A. No, I can not.

Q. Do you know the signatures? A. No, I would not attempt to identify it without seeing the other side.

Q. You do not know where that \$40,000 original check is now, do you? A. No, I never saw it except once. After I received it on that occasion I finished with this matter.

Q. Did you endorse it before you got the \$40,000? A. Yes, sir.

Mr. Cahill: I think I have about covered the direct. Your witness.

*Cross examination by Mr. Behrens.*

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Q. I notice, Mr. Spies, that one of the questions omitted by your counsel is why this money was put in your wife's bank account out in Lynbrook. I suppose I might just as well ask you that at the start off.

The Court: You know that in a sense that is not a question?

Mr. Behrens: Yes.

The Court: You will get to that?

A. There are several reasons, Mr. Behrens. One was the day before I had called Dr. Sharpe. I believed I was going to die, and then I was not very interested, thinking I was going to die, so I figured anyway to put it in Mrs. Spies's name in case anything did happen to me. The check was on the North Bergen Trust Company, and there was a reason that I preferred the cash anyway.

Q. I asked you for the reason as to why you put it in your wife's bank account. As I understand your answer you say that your reason was that you feared that you were going to die and it was on the expectancy of her obtaining the money in the event you did die? A. No. I must elaborate on that question. Another reason was that it was a large sum of money, the largest I had ever made, and I felt the right place was to put it away in my wife's bank account in trust for my children.

Q. Would you say then that the real reason that you took that course of conduct, at least so far as depositing it in your wife's bank account, the basic reason for that was this fear that you were going to die? A. That and the other reasons I just gave you.

Q. And that is not only that this check was drawn on another bank or a bank in another State, but that it was a large sum of money? A. That really is not an answer to the question.

Q. Give me the reasons why you put this money in your wife's bank account? A. In the first place the bank account was opened, and I did think I was going to die, and the thought of depositing the cash in Mrs. Spies's account in trust for the child was so that she would have it in the event that anything happens to me.

The next reason, that she was my wife and I wanted to be sure, I believed that I had the right basis for it, I wanted her to have at least partial access to it. I considered it really her money.



Q. Why did you consider it her money? A. She was my wife and it was my wife's bank account. I did not consider that she had earned it.

Q. Or had any right to it legally? A. Except morally.

Q. Do you recall, Mr. Spies, that when you were over at 90 Church Street on April 27, 1940, there was present yourself, Mr. Reighley, Mr. Deneen and a stenographer. Do you recall that? A. Yes, sir.

Q. Do you recall that before you started to give your testimony there you stood up and Mr. Deneen swore you to tell the truth? A. I do.

Q. You recall that? A. Yes, sir.

Q. When you finished the examination you asked leave to submit a four-page statement which you had prepared? A. I do not remember whether it was at the end or the beginning. 482

Q. Perhaps I can refresh your recollection. A. Yes.

Q. I am reading now from page 15 (reading):

"Q. Is there anything else you want to add to this record? A. Following the conference last Monday in which you raised several questions which I could not answer at that time concerning certain items of deposits and withdrawals in the various bank accounts, many in my wife's name, I discussed this matter with Mrs. Spies since then and without much success. If I could get this information before you conclude your case, I will send it to you, and I will make every effort to work out an explanation of the questionable items." 483

Following that statement which was made at your office on Monday, April 27, 1940, I would like to show you the following statement and record which consists of four pages, initialed by you. Do you recall it? A. I do not remember making that statement. I know I submitted a four-page statement.

Q. "As part of that interrogation I want it to become a part of the record and brought it with me." A. Nobody asked me to prepare it, Mr. Behrens.

Mr. Behrens: May I have this marked for identification?

(Marked Government's Exhibit 50 for Identification.)

Q. I show you Government's Exhibit 50 for Identification, Mr. Spies, and ask you what that is? A. That is the original of the four-page statement that I delivered at that time.

Q. I would like to know whether you prepared this statement yourself? A. Oh, yes.

Q. Did you type it yourself? A. Yes, sir.

485 Q. You read it over before you submitted it? A. I would say so.

Q. It appears that your signature appears on each of these pages, is that correct? A. I would like to look at it.

Q. Yes (handing to witness). A. Yes, sir.

The Court: What is the date of this?

Mr. Behrens: This was submitted at the meeting held on April 27, 1940. This statement itself has no date on it.

Q. Do you recall putting in the statement this language (reading): "In December of 1935, the set-up needing money for its pay roll for employees asked me if I knew where we could get about \$5,000, or \$6,000, temporarily. I spoke to

486 Mrs. Spies about it, told her of the negotiations, and said that it was a pity that we would have to go outside and borrow the money for the Company and suggested that if she would loan it to the Company she would be sure of getting it back and that if anything came of the negotiations to sell whatever I got out of it I would put in trust account in her name so that it would be hers."

Do you recall putting that in there? A. Yes, that is in there. I certainly said it, Mr. Behrens.

Q. There is no question in your mind that you had control over these various accounts in the name of your wife or in the name of your wife in trust for somebody else, is there?

A. Only in so far as—you are talking about legal control?

Q. Practical control? A. One thing I feared was my ability to provide for my wife; that she could be a wife to me; and as I suggested to you, control that any husband has over a general situation.

Q. You drew checks on many of these accounts? A. Yes.

Q. You made deposits in them? A. Very few. I made my deposits in the corporate accounts.

Q. Do you recall writing letters to some of these banks which had your wife's bank accounts in them and in these letters enclosing checks for deposit? A. On one or two occasions, yes. 488

Mr. Behrens: May I have Defendant's Exhibit A?

Mr. Cahill: What is it?

Mr. Behrens: It is a photostatic copy of the letter enclosing a check for \$399.

Mr. Cahill: I think it is here (handing).

Q. This letter which is Defendant's Exhibit A refers to the enclosure of a check for \$399. Will you tell us on what bank account that check was drawn? A. No, I cannot tell without looking over the records, Mr. Behrens.

Q. What records would you desire to review in order to be able to tell us as to this item of \$399? A. Whatever 489 records Mr. Reighley and Mr. Deneen had, and the records and books. This is one transaction on which money was advanced and might have even been a check from United Sponsors in payment of the loan that she endorsed. I see here it is signed not by me but by somebody else, Mr. Behrens. Therefore I cannot say. It would appear, however, as if it were my check of \$399.

Q. Have you reviewed these various bank accounts, Mr. Spies? A. No, sir, I have not.

Q. Will you tell me if that was not done in Mr. Whearty's office in March of this year? A. Most of the time spent here was in discussion. Very little opportunity was given to me to examine anything. When I asked for the record of United Sponsors Mr. Reighley and Mr. Deneen would not give them to me.

Q. You won't say they were excluded by Mr. Reighley's permission? A. No.

Q. What book do you think would be of help in explaining the \$10,000? A. It was in connection with the payment of a sum in the amount of \$2,462, which was drawn to us from United Sponsors, and they refused to let me have it because, on the statement that I made before, that would be disclosing the Government's case.

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Q. What books and records of United Sponsors that you know are in the possession of the Government will help you to explain any item going to make up this item of \$10,000 unexplained income? A. I would say some books which were used to show some of the income.

Q. We have put in evidence, so far as I recall, the reports of the United Sponsors. Can you recall any other thing in connection with United Sponsors that was put in evidence? A. No, but you are talking about a conference in Mr. Whearty's office where there were scores of schedules from sheets and books.

Q. Let's forget the conference at Mr. Whearty's office. What books or records do you think that the Government has in its possession which will assist you in explaining a single item of this \$10,000 of unexplained income? A. I cannot answer that except to say this: whatever records the Government had to build up this case of \$10,000 of unexplained income, which has been blamed on me, I might check to show that it was not income, as I claim.

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Q. Mr. Spies, is there a single solitary item of the claimed unexplained income here that is connected in any way with United Sponsors? A. It was, of course, some thousands of dollars.

Q. Of unexplained income? A. Yes, by that means.

Q. How much would you say you got from United Sponsors in 1936? A. I stated altogether about \$11,000, including the repayment of the notes; somewhere between \$11,000 and \$12,000.

Mr. Behrens: May I have the checks, please?

Q. Let us take this page of the ledger, first, the page having been marked Government's Exhibit 47. I believe you have given us some testimony of some loan of \$7,000 or \$8,000 by Mrs. Spies? A. \$8,440.

Q. Do you have that letter which you say you exhibited to the agents? A. Yes, Mr. Cahill has it.

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Mr. Behrens: I wonder if I could see that.

Mr. Cahill: What letter?

The Witness: I attached that to the memorandum I seen the other day from United Sponsors showing the amount of the loan, \$8,440. It was attached to the memorandum. It was with those, Mr. Cahill. You had it on Sunday, Mr. Cahill.

Mr. Cahill: The responsibility is mine. Perhaps if you leave the stand for a moment, you may find it.

The Witness: May I do that?

The Court: You may.

(The witness left the stand and went about in the court room.)

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The Court: Perhaps we can go on to another question.

Mr. Cahill: We have it.

The Court: You have it?

Mr. Cahill: Yes.

Mr. Behrens: May I have it marked for identification?

Mr. Cahill: Yes.



Mr. Behrens: Mark this for identification.

(Marked Government's Exhibit 51 for Identification.)

Q. I show you Government's Exhibit 51 for Identification. Is that the letter to which you refer? A. Yes, sir.

Q. When did you exhibit that to either Agent Reighle or Agent Deneen? A. I believe that it was at one of the three or four conferences we had.

Q. Would you know at which one it was? A. I could not say that.

Q. In which you presented the letter to them? A. I would  
497 not feel safe in doing that.

Q. This letter refers to a note for eighty-four hundred and some odd dollars? A. Yes.

Q. Will you look at the ledger of United Sponsors which is there and see how that tallies up with this \$8,400 item? A. It does not.

Q. They are entirely different? A. They are considerably different, by several thousand dollars, in my opinion.

Q. How much did Mrs. Spies loan to the United Sponsors and when? A. I think it was between \$5,500 and \$6,000; in December of 1935.

Q. I show you an item on this page of \$5,002.83 credited to the notes payable account on December 6, of 1935. A. In 1936, it looks like, Mr. Behrens.

Q. December of 1936? A. Yes, that is a total. This sheet  
498 is dated 1936. There is no 1935 date on this as far as I can see.

Q. I just asked you— A. I do not know which are credits and debits. Does that mean this amount was paid to me?

Q. The amount in the right-hand column is the amount that has been loaned? A. That is clearly an error.

Q. By how much? A. By \$3,000—over \$3,000. Here, in this letter indicates, as I said, you have a note here for



\$8,440, because it asked me to return the note as they are making a payroll payment.

Q. Mrs. Spies never advanced any \$8,400? A. No.

Q. Mr. Hillyer put in \$2,000 in December? A. No, I did not say that.

Q. Isn't that fact? A. I said Mr. Hillyer put in approximately \$2,000 and Mrs. Spies put in between \$5,500 and \$6,000.

Q. That still would not make up \$8,400? A. My recollection may be off \$300 or \$400.

Q. Do you know what these two other items were, one of \$400 and one of \$1,600? A. No. That sheet may be erroneously started out. It refers to notes payable, M. R. Spies. It appears as this had been inserted after entry, because a note was never made payable to M. R. Spies. There were no notes payable to me as far as I know.

Q. You never did deal with the company so far as advancing money was concerned? A. An actual contribution, a loan?

Q. Yes. A. Yes.

Q. It was you who discussed with Mr. Hillyer putting in the money to bolster up one of the company's bank accounts? A. Yes, physically.

Q. That was not in fact a deal with any officer or director of the company? A. No. I had to finance or put money up, as that statement indicates.

Q. Also on this notes payable account which you will see adds up to \$8,800—do you see the last item there? A. I do.

Q. Do you recognize the amount of commissions which you were entitled to at the end of 1935? A. \$8,800.

Q. Not \$8,910? A. I do not recognize that at all. As a matter of fact I waived all commissions.

Q. You did what? A. I waived all commission payments to me from the company; deferred them, not waived them. That is something I have never seen.

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Q. You did not get those checks? A. No, I did not get those. We had an organization of twenty-five or thirty people and a couple of bookkeepers.

Q. You could not say whether the books are accurate or not? A. I can say they are inaccurate.

Q. You prefer the letter to the books of the company? A. Obviously. If you will read this letter it shows a final payment of \$2,242 accompanied this letter. There is no entry like it in the notes payable.

Q. So you cannot find it there on the records (indicating)? A. No, sir, I do not see it.

503 Q. Look at these two \$1,100 checks and see if they do not add up? A. No, I do not think they do, Mr. Behrens. I am sure they do not. As a matter of fact the \$2,428.42 is the final payment on the loan. There is no such item on this. It is obviously inaccurate, in my opinion.

Q. If you add together this \$1,129.24 and this \$1,112.74 or add—what is the date of those? A. November 1, 1936. These are payments in here. This payment is not shown on this book, an item of \$2,000.

Q. Let me straighten this out. A. Yes, sir.

Q. In what way has the Government erred in computing income to you from United Sponsors? A. The Government had \$10,000 additional income.

Q. From where? A. Through items such as these, failing to give credit, failing to mention the loans and deposits on their bank accounts.

Q. Do you trace some payments you received from United Sponsors into unexplained bank accounts? A. Of course

Mr. Behrens: Have you got those checks? I would like to get those checks that we had.

The Court: Take your time.

Mr. Behrens: I would like to have these checks and papers of the United Sponsors marked for identification. One is a group, I think, of four checks.

(Marked Government's Exhibit 52 for Identification.)

Mr. Cahill: Checks drawn by United Sponsors?

Mr. Behrens: Yes, sir. Here is a group of ten checks of United Sponsors.

(Marked Government's Exhibit 53 for Identification.)

Q. I show you Government's Exhibits 52 and 53 for Identification and ask you what those are? A. Are combination salary checks and repayment of loan.

Q. Do you recall having received anything other than this in the way of checks from United Sponsors in 1936? 506

A. I should like to know what the total of these is, Mr. Behrens.

Q. Roughly \$10,000. A. Yes, I would say at least \$2,000 in addition.

Mr. Behrens: I would like to have this schedule marked for identification.

(Marked Government's Exhibit 54 for Identification.)

Mr. Cahill: Whose schedule is it, Mr. Behrens?

Mr. Behrens: I will explain it.

Q. Mr. Spies, this Government's Exhibit 54 for Identification is a schedule which sets forth in the first column the bank and in the second column the account at the bank, and the third is the date of a deposit in 1936. When you add those all up you get \$10,439.52, which is the amount we claim is unexplained. I would like you to take these checks and just check them against that schedule and see if we have included any check of United Sponsors as unexplained income? A. I do not say that. I say you failed to include 507

certain items from United Sponsors which came back, or the repayment of a loan. Also it works out the same way.

Q. Just a minute. Let's see if we can straighten this out. See if there is any item of unexplained income in that schedule amounting to about \$10,000 that you can explain by use of these checks of United Sponsors.

Mr. Cahill: I object to the question as to explanation. This man may not have found it.

The Court: That is what he is trying to get the witness to tell him. If that is so, that is what he wants. That is proper cross examination.

Mr. Cahill: Exception.

A. Mr. Behrens, you asked if the \$1,000 item is on here from United Sponsors. I really cannot go through these.

Q. I have no idea how much money was deposited. I would like you to tell me, if you can explain it by reference to the check of United Sponsors? A. If you will give the book back?

Q. (Handing witness.)

Mr. Cahill: There is another objection to this line of questioning. This document which has been identified is the work of somebody. I do not know who. I do not know how we could use it for the purpose of checking until its accuracy has been established. It is merely a piece of paper. We might take it out of a newspaper.

The Court: He has a list. Ask whether any of the items on this list—it may be a fictitious list, but the witness is in position to say so—whether any of the items on that list can be correlated and whether it has anything on it which emanated from United Sponsors. That is a proper question on cross-examination.

Mr. Cahill: I take an exception.

A. From my examination I do not see anything.

Q. Can you think of any other records of United Sponsors which might help? A. Yes, I would say that the check books and the notes payable account to Marie V. Spies.

Q. Here is the entire ledger (handing witness). A. I have no way of knowing this. All I do know is this: You show a figure of \$10,000 from United Sponsors. I think that that note was for \$8,440. Your own testimony shows \$1,000 of salary which I deny, and \$3,000 in additional—

The Court: Do not engage in argument with counsel.

The Witness: Yes.

Mr. Cahill: I think, if the Court please, that that was a reply to the question, the explanation of his position. 512

The Court: I have read it. You do not get anywhere when the jury is looking at the evidence.

The Witness: I will watch that carefully, your Honor.

Q. I believe you have said that with reference to the item of \$34.80 deposited in your own personal account in January, 1936, you were quite sure that that was simply an exchange of checks? A. I said I believed it was, yes, sir—the issuance of a check for cash.

Q. Yes. And also with reference to the deposit of \$32 on January, 24? A. That is right.

Q. You think that that was cash you had received from Mr. Taylor for which you had issued two \$16 checks? A. Yes. 513

Q. Would you go down the list and let us have an explanation of the other \$10,000 that we do not know about. You can start right up at the top.

Mr. Cahill: I object to it.

The Court: You call for an item. Let the witness answer.

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Mr. Cahill: I object to this document which is not in evidence.

The Court: That is why I am letting him hand it to the witness. You call an item and ask for an explanation. That is just what you want.

Q. On July 29, 1936, \$240 was deposited to the account of Marie V. Spies's regular account in the Bank of Rockville. Do you see that \$240? A. It is either a transfer or issuance of check for cash or some similar explanation, because it was not income.

515

Mr. Cahill: This document being of an unknown author is being used for the same purpose. I will object to this testimony on the ground that because there was an entry on there there should be a deposit.

The Court: The witness can say there is no such deposit.

Mr. Cahill: I am objecting to some form which is on there by an unknown author. The accuracy of it has not been established.

The Court: He asked the witness "Did you make a deposit of so much and what was the character, or course of it."

Mr. Cahill: He is asking as if it was a document from the bank.

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The Court: This is a memorandum prepared by the District Attorney which is not in evidence. On the other hand I do not see why the District Attorney should be deprived of the opportunity of asking about the memorandum.

Q. I show you Government's Exhibit 31 and I show you the deposit in your account, July 21, 1936, in the sum of \$240, and ask you whether that deposit was made in your account? A. There is no way of telling whether it was or not.



Q. Will you tell us where that \$240 came from? A. I said it was either a transfer, a deposit made by Mrs. Spies which came from somewhere, from the \$38,000, and the extra income during 1936 from United Sponsors of \$2,000 or \$3,000.

Q. That \$240 may have come from United Sponsors? A. It could have come from any one of those sources. It may have been the repayment of a loan.

Q. It might be salary? A. Not on July 29, 1936. I was not employed nor did I have any source of income whatever.

Q. It may be a transfer of funds? A. Yes.

Q. May have come out of some other account? A. Yes.

Q. We could find that out by looking at these accounts? 518  
A. From those in evidence.

Q. Somebody may have given you cash and you gave a check? A. I told you that, yes.

Q. You see a deposit of \$399 to your account on August 12, 1936, and I ask you whether that deposit was made here? A. Yes, definitely.

Q. Where did it come from? A. That is the \$399 that I sent to the bank with the letter which the defendant has introduced in evidence.

Q. Could you tell us where it came from? A. Apparently came from one of the check accounts or bank accounts of United Sponsors on a repayment. I tried to explain that Mr. Hillyer, when he kept the books, some of them were cash, not deposits. Hillyer got his money and then we deposited the cash remainder, as I recall it, in one or two banks. 519

Q. Here are the checks. Suppose you take these checks and see how they are endorsed, where they were deposited, and in the instances where they were not deposited see if you can trace some of it into the bank account?

Mr. Cahill: What checks are those?

Mr. Behrens: Those are the checks of the United Sponsors which have been marked Exhibits 52 and 53 for Identification.

Mr. Cahill: A \$399 item?

Mr. Behrens: Yes.

Mr. Cahill: He can give you the total.

Mr. Behrens: I am not interested in that column. I would like an answer.

Mr. Cahill: That would be a starting point.

The Court: Let the witness answer.

Mr. Cahill: All right, sir, if he can find it.

521 The Court: You will have ample opportunity on redirect. I will give you every opportunity to refresh the witness's memory.

A. These do not seem to be all the checks of United Sponsors.

Q. You think there are some more checks? A. I feel certain there are. I do not believe these total up—total the amount received from United Sponsors.

Q. We will see if we can find any more after a while. I think that is all. Look at August 24. A. I see it.

Q. \$100? A. Yes, sir.

Q. Where did that come from? A. I answer in the same way. It was transferred from one bank account or cash, or cash and check in one bank account, cashed \$25 out. Here is \$100 in here (indicating). I think the record shows 522 that I had many transfers.

Q. About \$42,000 worth as I recall it. A. I do not think it was \$42,000, Mr. Behrens.

Q. Let's take another bank account and see what we can do with some of these deposits. Would you be good enough to take a look at Government's Exhibit 38 in evidence, and I ask you whether there was a deposit of \$475 on December 4, 1936? A. Yes, there was.

Q. Where did that money come from? A. That may have come from a brokerage account; may have come from one of the other accounts, or may have come from United Sponsors.

Q. You say it may have come from a brokerage account?  
A. Yes.

Q. Let's look at the brokerage accounts. A. May I see the United Sponsors check again, please?

Q. Oh, yes (handing witness). I will see if I can find it for you. We will look for that particular batch.

The Witness: I would like to ask Mr. Cahill if I may have the Lynbrook bank book. It is in the exhibit file which I carry in my envelope. I think I had it out on the table, Mr. Cahill. 524

Mr. Cahill: Had it on the table?

The Witness: That is the folder, I believe.

Mr. Cahill: This one (indicating)?

The Witness: Yes, sir.

Mr. Cahill: The bank book?

The Witness: On the Lynbrook National Bank.

The Court: Is there a question?

Mr. Behrens: I think I had asked him where the \$475 came from, but I did not get an answer to that question.

The Witness: I make the same answer. Unless I have before me the withdrawal statements from all banks, I would be in no position to know whether this refers to a withdrawal from one and a deposit. 525

Q. You know it did not come from United Sponsors? A. I could not say that it did not. It would appear from even the books that it does not.

Q. You never did get anything at all from United Sponsors after October 1, 1936? A. You are right on that, Mr. Behrens.

Q. So we rule that out. A. Yes.

Q. You figure it may have come from a brokerage account. I would like for you to look at Exhibits 40, 41, 42 and 43 and see if it came out of that brokerage account?

A. I really—I think I will have to call on my counsel to try and explain it as a credit and a debit. Which do I get?

The Witness: Maybe Mr. Behrens can help me on it.

Mr. Cahill: Maybe we can get together.

The Witness: It means that I received the cash is what I am interested in.

Mr. Cahill: These are the credits. These are the charges against you (indicating).

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The Witness: That means they delivered a check to our account? Right.

Q. Yes. A. This one may come out of Edward B. Smith's account. I think there is a difference. There is a lapse on this between the withdrawals and deposits. Here is a withdrawal of \$495 from the brokerage account by check.

Q. What is the date of that? A. September 4, 1936.

Q. September 4, 1936. We are talking about a deposit on December 4, 1936. \$475 against a withdrawal of \$495 in a couple of accounts. A. If I had the withdrawals from the various bank accounts, I could come closer to it.

Q. Which banks would you like? A. All of them.

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The Court: This is a good time for a short recess and it will give you a recess while the witness examines these records.

(Short recess.)

The Court: Will the reporter read the last question?

(Question read.)

The Court: You are still talking about \$475?

Mr. Behrens: I am, your Honor.

Q. May I ask whether your review of the bank accounts and the books and check books and so forth have helped you find out where that \$475 came from? A. In the limited time I have, Mr. Behrens, to make an investigation, I find only one item which may have had connection with the December 4 deposit, and that is a withdrawal on November 28, six days before, of \$500 from one of the banks.

Q. You do not know what that withdrawal was for, do you? A. No, sir.

Q. Did you look at the same bank statement? A. I will do that.

Q. You find another one in the same account of \$350 on December 21? A. I make the same answer to it as I did to the others. 530

Q. Would you repeat what your answer is? A. My answer is that there was no income of mine during the year 1936 except \$38,000 and the \$3,000, approximately \$3,000, from United Sponsors, and therefore about all of these amounts I must say that they either represent transfers from one of the bank accounts or withdrawals, such as the one I just indicated here, and deposits from brokerage accounts.

Q. Is it because of the limited time at your disposal that you are unable to tell us whether or not these are transfers and these are funds received from brokers? In other words, if I gave you all of the Government's exhibits and this schedule, do you think that you would be able to explain these unexplained items, if I said, for example, that that is all now and come back tomorrow? A. No, I do not think I could, Mr. Behrens. I do not think time is what I need. I think what I need is some definite recollection from some definite indication that they were income, because my recollection now is that they are not income. 531

Q. The question I am asking you is not whether these deposits are income or whether they are principal. I am asking you where they came from. Could you give us an

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answer to that question if we gave you all of these records.  
A. Specifically with respect to each item I could not, under  
no conditions.

Q. If we could make available to you any records which  
would help to explain where the \$10,000-odd of this so-called  
unexplained deposits, could you say? A. No, the only record  
on that is my own statement and the lack of a  
recollection from the books of any source of income from  
any source whatever.

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Q. Did you keep during 1936 or 1937 your own cash book  
or ledger or any records of receipts and expenses? A. No.  
I did not. The girl at the office kept whatever was kept  
and for a while we had a bookkeeper.

Q. Did you have a personal set of books? A. The only  
set of books I ever had was a check book and a bank book  
of course.

Q. Do you know where those check books are now?  
The only check books I had available are the ones I deliv-  
ered to Mr. Reighley.

Q. From these check books can you explain any of the  
unexplained deposits, that is, the source of them? A. I  
would not know. I could not possibly analyze it, Mr.  
Behrens. I would go back to the same statement I made  
before.

Q. Will you tell us when you were admitted to practice  
and where? A. In the Second District, I believe, Brooklyn.

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The Court: Department?

The Witness: Second Department, May 4, 1932.

I recall it.

Q. At the time you were employed, were you not?  
Yes, sir.

Q. What was your employment then? A. I was a  
clerk and secretary to Mr. Reed B. Dawson.

Q. Approximately what was your salary at that time?  
I think it was either \$50 or \$60 a week; probably \$50.



Q. Will you tell us when you first received remuneration from any of these investment trusts with which you became associated? A. I would say in 1933.

Q. And the following year? A. Yes.

Q. At the time were you still associated with Mr. Dawson? A. No, sir.

Q. You were practicing for yourself? A. I was.

Q. In 1933 did you have any sort of employment contract with any of these companies? A. I do not believe so, Mr. Behrens.

Q. When did you first get an employment contract with them? A. I think it was in 1934.

Q. Do you recall how much you were being paid under your employment contract? A. I think it was \$6,000 a year for the two companies, from each of the two companies. 536

Q. Yes? And that was in 1934? A. That was either 1934 or 1935.

Q. Did there come a time between 1932 and 1935 when you devoted substantially your entire time to the activities of these investment trusts? A. I think beginning in 1934 I devoted substantially all my time.

Q. What pay were you receiving in 1934 from these companies for devoting almost all your time to them? A. I think it ran around—I cannot really remember on that, Mr. Behrens—I would say somewhere around \$6,000 from the two companies together.

Q. That is in 1934? A. Yes, sir.

Q. Now we get down to 1935. What was your income from the companies in that year? A. I would say it ran around \$11,000. 537

Q. Will you say that was the net or gross figure? A. I would not. I think it was a gross figure.

Q. Were your expenses very much in that connection with that association with these companies? A. No, fairly small.

Q. It would not amount to over \$500 or \$600 a year? A. The expenses?

Q. Yes? A. No. I do not believe so.

Q. If I showed you a copy of your tax return for 1935 would it help to refresh your recollection as to exactly what you had gotten from the companies in that year? A. I think so.

Mr. Cahill: I do not see the relation of this to the 1936 tax.

The Court: This witness is on the stand. His credibility is very much at issue.

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Mr. Cahill: I do not know whether it is on that issue or not.

The Court: It is at least admissible on that issue. There may be other grounds.

Mr. Cahill: I object to going into the amount of income. The amount of income is not an issue here. That is not an element of the alleged crime.

The Court: I overrule the objection.

Mr. Cahill: Exception.

Q. I show you Government's Exhibit 17A in evidence and I ask you if you can refresh your recollection as to the exact amount of your gross income from these companies in 1935? A. The gross income appears to be \$11,588.66.

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Q. How much are your expenses in order to make that income? A. Practically nothing, I would say, Mr. Behrens.

Q. To all intents and purposes your gross income and your net income from these companies was practically the same? A. In this year, yes.

Q. Before I forget it, I think you told us there is another Murray R. Spies here in New York City? A. No, there is a Murray Spies up at 57th Street, an uncle of mine.

Q. You do not claim you are not the Murray R. Spies named in the indictment? A. No. We brought that out in fairness to my uncle, not to me, of course.

Q. He is your uncle? A. Yes.

Q. His name is not Murray R. Spies? A. No, it is Murray Spies.

Q. I believe you told us that you had been rejected for life insurance on several occasions? A. Yes, sir.

Q. And there was some fear that you were going to die?

A. Yes, sir.

Q. When did you first get that fear? A. I got it back as far as 1932.

Q. How often did you have it? Have you still got it?

A. To some extent.

Q. Do you claim that during 1936 and 1937 you were insane? A. No, sir. At least, I did not feel I was, although sometimes I thought I was. 542

Q. Do you feel that you were mentally incompetent in 1935? A. There was a good part during 1936 and 1937 where I was inclined that way.

Q. You were actually mentally incompetent? You did not know what you were doing? A. No, I would say that I was not mentally competent, not actually competent. I did not feel that I was efficient or calm mentally.

Q. Did you understand what you were doing on those days, Mr. Spies, or were you just walking around in a fog?

A. Most of the time I believe I was walking around in the fog.

Q. Were you pessimistic on these days, let's say? A. Yes and no, Mr. Behrens.

Q. Would you explain that answer, please? A. Yes. 543  
Some days I would be very depressed and pessimistic and some days I would not be.

Q. I suppose this great fear you had of dying would vary in intensity from time to time? A. Yes. During that period sometimes it would become more aggravated than others.

Q. You say this was born way back around 1931 or 1932? A. Yes, years ago. That was in 1931 with the first insurance rejection.

Q. That continues with you even now? A. I think it is the tail end.

Q. But you still have it? A. I have some recurrences when things get a little bit rough.

Q. In other words, you get worried? A. You do. It is not just a question of worry. It is something that a layman can hardly explain. It is a mental condition which I do not think I would attempt to explain except that this fear is just as great as if somebody were walking behind you with a gun threatening your life.

Q. You figure you are just going to die? A. Now?

Q. When you have this fear? A. Oh, yes.

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Q. When you have that fear I do not suppose you can do much in the way of work? A. Cannot do really anything in the way of work.

Q. Back in 1936 and 1937 did you feel that your mental condition was so bad that you might have sold your watch to somebody for a dollar? A. No.

Q. You had no sense of value whatever, I assume? A. I do not believe that I was completely without the sense of values.

Q. Did you understand the relationship between one event and another? A. I believed I did. I do not think the results prove that I did.

Q. Now, were you able to write checks during 1936 and 1937? A. I was.

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Q. Draw contracts? A. On many occasions—no, I do not believe I drew more than one or two contracts.

Q. And negotiate loans? A. Well, I borrowed some money. There was not very much work involved in negotiating them.

Q. You understood what you were doing when you borrowed money? A. Of course.

Q. Did you feel that when you made this contract to put up \$11,000 on this joint program in connection with the

sale of Listed Securities, did you understand that that was your money that you were putting up? A. Oh, yes.

Q. And that you obligated yourself to put up that money?

A. Yes, of course.

Q. Did you put it up under any compulsion of any kind or was it a matter of your own best judgment? A. I do not believe that there was any compulsion. It was my best judgment at the time.

Q. When you embarked upon and took over these cares in 1937, would you say that that was the result of the operations of your own free will? A. February, 1937, yes.

Q. In the first, say sixth months of 1937, who was it that directed the investment policy of these companies with which you were associated? A. We had a board of four or five individuals—I think four, perhaps. 548

Q. Who were they? A. Mr. Charles B. Keane, Mr. S. J. Taylor, Mr. W. H. Davis and I.

Q. Isn't it a fact that it was very rarely that Mr. Keane made any decisions on matters of investment policy? A. I think so. I think he seldom decided a matter.

Q. It required the concurrent opinion of three of you before any investment could be made? A. I think it probably took a majority of three to decide.

Q. So half of the directors would be able to decide? A. Two out of three, which is a very common provision.

Q. Is that your testimony, that that was a provision in the by-laws of the trust company? A. I think so.

Q. And then would you say that during the first six months of 1937 you attended a meeting of the board of directors of these companies for the purpose of deciding the investment policy or what was to be purchased and sold? A. I think there was only one company that was buying and selling securities. 549

Q. What was that? A. National Fund, Incorporated.

Q. When did you first become interested in National Fund, Incorporated? A. I think it was either in January or February of 1937.

Q. How did you become interested in it? A. There was an advertisement that appeared and someone called me up and as a result of it I contacted Mr. Davis, whom I had never met before, and put through a contribution of some capital and I became a member of the board with Mr. Keane and Mr. Taylor.

Q. You know that your discussions with Mr. Davis continued before you became a member of the Board? A. We probably had two or three conferences.

Q. Did you agree to invest some of your capital in that program? A. Not at the time.

551 Q. How much did you pay Mr. Davis in order to get into this program? A. I paid Mr. Davis \$1,500 I believe.

Q. Did you buy some stock of the corporation at or about that time? A. Yes, sir, I think I bought about 10 per cent of the stock of the company.

Q. When you came in what were the plans of the corporation for the future? A. When I came in we were to continue distributing trusts which had been registered by Mr. Davis in 1935 with the Securities and Exchange Commission, and distribute them on a national basis.

Q. How long did you figure it would take to have it set up by a committee to a point where you could distribute on a national basis? A. I thought it could possibly be done in a month or so.

Q. How much capital did you figure would be required? A. Maybe \$1,500 or \$2,000.

552 Q. In connection with this company with which you became associated, will you tell us when it started to sponsor the sale of this corporation Listed Securities? A. That was in March, 1937, Listed Securities was organized.

Q. Who organized Listed Securities? A. I drew some of the papers.

Q. Who else? A. I would say Mr. Taylor did most of it and I, of course, collaborated with him.



Q. Do you recall discussions in connection with the incorporation of Listed Securities? A. Yes.

Q. That was in March, 1937? A. Yes, I think it was. Most of the work was done before March. Work was done in March.

Q. You were also interested at this time, namely, March of 1937 in another company which was in a similar program, isn't that correct? A. No, the other company was merely the sponsor company for Listed Securities. It had one purpose. It was a company that Mr. Keane and I and Mr. Davis had an interest in. It had no other function than to distribute the funds of Listed Securities nationally.

Q. What was the name of that? A. First Mutual; formerly known as Distributors Fund. 554

Q. Who organized that corporation? A. Mr. Taylor and I.

Q. And that was done when? A. I believe in December of 1936.

Q. So now coming down to the month of March we have you interested in Distributors Fund, the name of which was changed, wasn't it? A. Yes.

Q. To what? A. To the First Mutual Corporation.

Q. About when? A. Somewhere between December and March of 1936—December 1936 and March of 1937, I believe.

Q. Then you were also interested in National Fund? A. Yes, sir.

Q. Was a formal agreement drawn relating to these two corporations in which you were then interested as a sponsor to sell nationally Listed Securities? A. I believe so, Mr. Behrens. 555

Q. Who prepared that contract? A. I believe the three of us, Mr. Davis, Mr. Taylor and I.

Q. Do you recall the provisions of that contract with respect to how long it was to continue? A. No, I do not, Mr. Behrens.

Q. Do you recall any of its provisions with respect to when the profits of it should be split? A. No, I do not.

Q. Is it your testimony that in April, 1937, you were in the midst of one of these fear complexes where you thought you were going to die every minute? A. I do not know the date in April, but I know in February or March I heard the first suggestion of coronary thrombosis. From that point on I was going to a doctor, as you see, although I did do some work.

Q. We will go into that a little more in detail. A. Oh, yes.

Q. Who told you you had coronary thrombosis? A. I think Dr. Gilman told me that he had received a letter from the New York Life Insurance Company in which it said my application for insurance which I made in January or February or March of 1937 was rejected and that the examination suggested a coronary—I do not think they said definitely that it was coronary. I took it as definite.

Q. And that information came indirectly from a letter written by the life insurance company to Dr. Gilman? A. I do not believe I ever saw the letter. I think Dr. Gilman told me. I also believe that I received the information. As a matter of fact, I went out of my way to get that information from him.

Q. This was not the first time you had been rejected for life insurance, was it? A. No, but it was established that it was coronary thrombosis.

Q. What did they tell you when you were rejected as to what the trouble was? A. It was heart, vertigo and high blood pressure and rapid pulse.

Q. And they told you, I suppose, that you could not expect to live longer than another day or so? A. No, sir, I told myself that. The doctors, at least, tried to indicate otherwise, but I would not believe them.

Q. Were you disturbed so much by the fact that you could not get insurance or was it the fact that you had this

high blood pressure or vertigo? A. I was disturbed by two things, at least two things. First, that my condition was a precarious one and, secondly, because it was precarious, my family would be left without a means of support.

Q. Isn't it a fact that as far back as 1932 you could have gotten insurance of \$10,000 or \$15,000 if you paid a little more premium? A. Yes, but at the time I could not afford the premium. I was making \$50 a week.

Q. You had one insurance policy that had lapsed, I believe? A. That was in 1928.

Q. When did it lapse? A. In 1928 for non-payment of premiums.

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Q. You gave us a long list of doctors whom you saw, did you, in 1936 and 1937. Did they treat you or did they just look at you and give you an examination? A. I think they did more than look me over and give me an examination. Most of them gave me bromides or some sedative, actual physical treatment. Something was administered:

Q. What, for instance? A. Treatment for the prostate, high blood pressure pills. I was told to take it easy, and things of that sort, things which made me worry more.

Q. Isn't it a fact that most of these doctors prescribed good hard work for you? A. No, I do not think so. You mean manual work and labor?

Q. No, mental work? A. No. There was a conflict of prescriptions. Some of them said to take it easy and go away. Some of them said try to do your work the best you can. I tried to operate on both prescriptions.

561

Q. Let's go back a little bit. You have given the names to us of these doctors, first that treated you in 1936 and 1937. Let's go back to around 1932. Will you tell us the names of doctors who treated you in that year? A. That is a little too far back, Mr. Behrens. I can only remember one or two. Dr. Gilman, of course, who has been my family doctor.

Q. Yes. A. And Dr. Marcus Rothschild, now deceased and there may have been one or two more in between, but I cannot remember their names.

Q. Dr. Dery, I think you gave us his name? A. I think he is the one that treated me on and off from 1932, somewhere around that time.

Q. How about Dr. Davidson? A. No, he was in 1936 and 1937.

Q. This Dr. Sharpe had not treated you prior to 1936? A. No, I do not think so. I think his first visit was in June 1936.

Q. I wonder if you would be good enough to tell me whether you recognize this.

Mr. Behrens: May I have this marked for identification?

(Marked Government's Exhibit 55 for identification)

Q. I show you Government's Exhibit 55 for Identification which purports to be an application dated April 1932, to the Prudential Insurance Company of America. Do you want me to identify the signature?

Q. Do you identify your signature on that? A. Yes.

Q. Look on the next page. A. This (indicating)?

Q. Yes. A. Yes, sir.

Q. You did not have anything to do with the back of the page, I assume? A. No, I believe not.

Q. Do you see your signature on the third page of the exhibit? A. Yes, sir, I do.

Q. And that exhibit contains the questions and answers which you gave to the doctors of the life insurance company when you went there for examination? A. From appearances this, I would say, reflects the answers put down by the agent or the doctor in summarized form of what my answers were.

Q. You say what?

The Witness: Will you read it?

(Record read.)

Q. After these answers were put down did you sign that paper? A. Yes, sir.

Mr. Behrens: I am offering Government's Exhibit 55 for Identification in evidence.

(Discussion at the bench, off the record.)

Mr. Cahill: You say you signed this, did you?

The Witness: Yes, sir.

Mr. Cahill: No objection.

The Court: What is the date of it?

The Clerk: Sixth of April, 1932.

Mr. Cahill: 1932, is it? I will object to it as not relevant.

The Court: Overruled.

Mr. Cahill: Exception. I thought it was 1936.

(Government's Exhibit 55 for identification now received in evidence.)

Mr. Behrens: I understand that Mr. Cahill wishes to call a witness.

The Court: You will be excused temporarily. For the convenience of a physician, who is a witness, we are going to call him out of order. Mr. Cahill is going to call him out of order.

Mr. Cahill: Thank you.

DR. HOWARD GILMAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

*Direct examination by Mr. Cahill.*

Q. You are a physician duly licensed to practice medicine in the State of New York, are you, Doctor? A. Yes, sir.

Q. And have been for how many years? A. Since 1921.

Q. You are in private practice here? A. That is right.

Q. Where is your office? A. 1791 Grand Concourse.

Q. In the Bronx? A. Bronx.

Q. Are you connected with some hospital? A. Polyclinic Hospital.

569 Q. In what capacity? A. I am an instructor and lecturer there, in the medical school there.

Q. Do you know the defendant Murray R. Spies? A. I do.

Q. When did you first become acquainted with him? A. In 1932.

Q. Did he consult you at that time professionally? A. Yes, sir.

Q. What did you find him suffering from at that time? A. If you do not mind my refreshing my memory with some records.

Q. Do you have your cards? A. I have my records from 1934 right to date. I can read a resume of my first treatment April 4, 1934. I saw him two years ago when he was 570 suffering from nervousness, sleeplessness, restlessness, excitability, having been turned down for life insurance due to murmur and hypertension. He imagined he had all illnesses. Examination at that time was negative with the exception of a rapid heart and a blood pressure which ranged systolic 136, diastolic 80; on another occasion he had low blood pressure, 110.

Q. Did you see him after that? A. I have seen him almost continuously over the space of seven years.



Q. Did you refer him at times to other physicians? A. I sent him for a consultation to Dr. Albert S. Hyman, who is a prominent cardiologist.

Q. Did you receive a report from Dr. Hyman? A. I received complete reports.

Q. Prior to that examination by Dr. Hyman did you talk with Mr. Spies about a heart condition? A. I did.

Q. Did he express fears to you on any of those visits? A. Well, he has been conscious of his heart all the time and thought that he had heart disease. He had been told that he had a murmur and had blood pressure, a high blood pressure and was afraid that he would get a paralytic stroke and perhaps die. Through all these years he has been heart-conscious.

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Q. Did he tell you about his fears as to certain daily experiences? A. Oh, yes.

Q. What did he tell you along those lines? A. Well, a lot of times he was afraid that he was going to drop dead. It became most marked in 1937—I have records showing it became most marked in 1936, when it shows he was afraid he was going to die, going to drop dead. It became marked in March, 1937, when he took a life insurance examination at the New York Life Insurance Company and he was turned down. He told me he had a coronary arterio disease.

Q. Did you cause him to be examined on that occasion? A. Oh, yes.

Q. Did you find any such disease? A. No such thing.

Q. Did you reassure him on that point? A. I reassured him then and I reassured him on one hundred different occasions.

573

Q. Besides the times shown by your records as times of visits to your office, did he call you on the telephone at times? A. I should say he called me at least once a week, sometimes more, sometimes less. I practically gave consultations all the time other than these visits, over the

574

*Dr. Howard Gilman—For Defendant—Direct.*

telephone. Many times I went down to his place of business when he found he was incompetent and could not carry on. He was at Exchange Place.

Q. Did he speak to you of his fear at that time? A. Oh, yes.

Q. Did you diagnose his trouble, Doctor? A. Yes.

Q. From what disease, if any, did you find him suffering?

575 A. I made a diagnosis that he had a fear psychosis, neuro-circulatory asthenia. Later with his fears of dropping dead, and was going into a subway he was afraid he might want to jump in front of the train. A number of times he said he wanted to jump out of the window and end it all. Naturally then I did change his diagnosis to that of fear psychosis. But organically I found nothing wrong with him.

Q. You have the report of Dr. Hyman here?

Mr. Behrens: I object to that as hearsay.

Mr. Cahill: All right.

Q. You say you saw him frequently during 1934, 1935, 1936 and 1937? A. That is right.

Q. Would you say you saw him scores of times? A. Scores of times.

Q. Could you state the number of times he consulted you over the telephone? A. Scores of times.

576 Q. Did you usually give him medication or what sort of treatment did you give him? A. A lot of my consultation was just plain horse-sense, talking to the man, trying to convince him that he was not as sick as he thought. At times I would give him a good sedative. Other times I sent him away on numerous vacations and go out and play golf and tennis on week-ends. I made him go back and work; when I found that he was able to work I would make him work. At other times I would make him stay away.

Q. Would you say that he was suffering from some kind of neurosis? A. It is definitely a neurosis.

Q. Can you describe it more definitely? I cannot use your technical terms correctly. Would you call it a form of neurosis or just a form of some defective disease? A. He had a neurosis which later developed into a fear psychosis. Psychosis means that he was definitely psychotic, a man who fears he is going to drop dead, visualizing himself jumping in front of a railroad train or jumping out of a window. Those are things which are psychoses.

Q. Did you observe any improvement in him in the course of your treatment? A. He definitely improved.

Q. Have you been treating him recently? A. I treated 578 him practically up to date. I saw him about ten days ago.

Mr. Cahill: I ask that this group of papers be marked for identification.

(Marked Defendant's Exhibit F for Identification.)

Q. I show you five sheets of paper with a card attached, Doctor, and ask you whether Mr. Spies presented these papers to you? A. Yes, he mailed them to me.

Q. Did he discuss those papers with you? A. He did.

Q. What did he say to you about them? A. This was at a time in 1937 following an attack of sciatica he had when he was living in Brooklyn. I could not take care of him because of the distance. I told him and advised him that he get a local physician to treat him, and he did not even trust my judgment, and he had lots of consultations generally while he was in Brooklyn. He was sent there to check up on his heart, his urine, his blood chemistry and also his basal metabolism, and urine examination. He had a complete workout of every possible laboratory procedure. 579

His note says here, I recognize his handwriting (reading): "The enclosed are for your information. What they

mean, I have not the slightest idea. I would feel better to have a check of myself personally. With reference to shakes he gave me amatol. It works best. May I use it?"

Q. Did you prescribe amatol for him at the time? A. I cannot recall if I used amatol, but I did answer his letter, spoke on the phone with him and gave him some advice, although this other doctor took care of him.

Q. Did you advise that he did not have any organic trouble? A. I explained that this corroborated my finding that everything was normal. This is a blood count, normal. Here is the blood record. 77 millimeters. That is normal. Urine, 13 millimeters. That is normal. Urine examination normal. Basal metabolism, minus 6. That is normal.

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Some doctor told him that he had goiter.

His examination was done by the Kahn and Klein test. They were normal. His blood chemistry: Calcium 9.2; phosphorus 3.8. That is normal. His kidney function test was normal. In fact every one of the laboratory tests corroborated everything that I told him, that this man was suffering from a nervous and mental condition and not a physical condition.

Q. What did you prescribe for him after that? A. He was brought down to see me on August 23, 1937. Following this sciatica he developed an attack of herpes zoster.

Q. What is that? A. It is known as shingles. The nerves of the spine and chest are characterized by severe pain, and at the point of the exit of the nerve in the back and the mid axillary line and in the front region.

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Q. What time was this? A. This was—this consultation was August 23. He had an attack of sciatica of approximately seven weeks, followed by herpes zoster for two weeks. When he came up to me this was completely finished and he was complaining of headaches and pain in the chest. He thought that was a heart disease. At the time I put him on a regime—advised that he take a trip and quit his business and work and take it easy.

Q. Did Dr. Hyman make the report which I now show you, dated October 30, 1935? A. Yes, sir.

Q. Did that examination, without going into details, disclose any heart conditions? A. No. He was down there and the doctor took films of his heart, with Mr. Spies in consultation. At that time his blood pressure was high—I will read it instead of guessing—his heart rate was 120 per minute and the blood pressure was 160 over 98.

Q. What are the normal pulse and normal blood pressure? A. 72 per minute, 72 to 80. The normal blood pressure of a man of that age should be about 115 over 80 or 70, a leeway of about 15 or 20 points, but not more than that.

Q. Did he ask for this examination by a heart specialist? A. Yes, definitely. He was scared he had heart disease. He had a blood examination. This was April 30, 1935.

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Mr. Cahill: That is all. Your witness.

*Cross-examination by Mr. Behrens.*

Q. What subject did you state you taught at this hospital? A. Internal medicine.

Q. Are you a psychiatrist? A. I am not.

Q. A neurologist? A. No, sir.

Q. Did you ever take this man to a psychiatrist or neurologist? A. No, sir.

Q. From this report as to shingles, did you find any symptoms of disease which were not neurological? A. Shingles is not a psychiatric disease. It is a medical condition. It is nerves and neuralgia.

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Q. Apart from that one instance of vertigo which you have mentioned, there was a single problem? A. Yes.

Q. For a psychiatrist or neurologist? A. That is right.

Q. So far as you know during this period of time there was no psychiatrist or neurologist who examined him or took care of him? A. Not to my knowledge.



Q. Would you tell us what is the difference between psychosis and neurosis? A. It is a pretty hard thing to explain to a layman.

Q. Will you be good enough to take a chance on my understanding it, and the Court and jury may understand it? A. I think I explained it before when I mentioned when a neurosis became a psychosis. Neurosis is a condition where a man is excited and irritable and has a sort of vague complaint. Actually he imagines illnesses which are not real. Ofttimes they cannot sleep. They cannot carry on their work. Sometimes they do. They are all agreed that you cannot pin it down to one thing. Most always  
587 they are neurotic. A neurotic can be perfectly normal and in a state of apprehension at another time. A neurosis can become a psychosis when a man starts thinking and doing things which are not rational, when a man feels that he has suicidal thoughts. That was indicated when he talked about a subway or window, and then told me that he planned to do so. It is similar to getting a gun; when a man uses those thoughts he has insane periods and there are periods of sanity, periods of incompetency.

It is very hard to give you an exact text-book definition because if you have a dozen authorities they all vary in their description of psychoses.

Q. Is it your testimony that during the period you were treating Mr. Spies he was insane? A. I never said he was insane. I said he was suffering from neurosis and then a fear psychosis following it. It is not the same in nature.  
588 I have had a lot of experience with these cases, personal contacts, where they are practically psycho-neurotic and where they have their fears disturbed and they get well. All cases of this type are not treated by psychiatrists because most people cannot afford a psychiatrist, and when doctors ofttimes—



The Court: Please do not volunteer. Be responsive to the questions of counsel. I think we would like to finish this.

Q. Will you tell us, in your opinion, whether in the years you treated Mr. Spies he was sane or insane? A. I would say that there were times when he was perfectly sane. There were other times when he was incompetent.

Q. I am speaking about insanity, not incompetency.

The Court: You may answer the question as to whether he is insane.

The Witness: I would not say the man was insane, because I am not considered an authority on it.

The Court: Then say so. Only tell us what you can say.

The Witness: I thought I answered that when I said he was incompetent.

Q. Incompetent to do what during this period? A. Incompetent to carry on his normal routine, his normal duties.

Q. What were his normal duties during this period of time? A. I mean to run the business.

Q. What type of business? A. He ran an investment trust, as I recall it.

Q. What were his duties in that regard? A. That I do not know. He made purchases and sales of trusts, that type of business.

Q. Is it your testimony that he could not attend to those duties? A. A lot of times he could and times when he could not.

Q. Would you say that he was competent to add up a row of figures during this period of time, if they were not too complicated? A. I have answered that the same way. At times he was normal and could do anything and then times when he could not do anything.

Q. I would assume that you would say that he was a person who was rather pessimistic in your contacts with him? A. Yes, he was quite pessimistic, and there were times when he would come in to see me when he was normal. When he was scared was when he could not do things, and he could not sleep.

Q. During this period of time that you treated him would you say that according to your diagnosis that he had no will power at all in choosing what he was going to do? A. You cannot pin me down to that.

593 Q. What would you say with respect to his will power, his power to reason, his power to take one of two alternatives and follow that alternative out. Would you say that he was competent to do that? A. At times when he was right he could do anything and at times he had the fears that he was not competent to do anything.

Q. He was afraid at those times, Doctor? A. Yes, often.

Q. Would you assume that he choose some method of coming there, either by car or subway? A. Subway?

Q. Yes. A. Yes.

Q. He was competent to do that, was he not? A. Yes.

Q. To choose a method of transportation by which he would arrive at your office certainly would show to that extent that he would have the will power to make a decision and to follow through his decision? A. Oh, yes.

594 Q. One further thing and that is all, Doctor. Does neurocirculatory asthenia,—you cannot have that and a fear psychosis at the same time, can you? A. It is two different things.

*By the Court.*

Q. Please answer his question, whether a person can be affected with these two things simultaneously.. That is the question and that is the only answer I want right now. A. It is two different things.

**Q.** Whether you can have those difficulties simultaneously. Can you answer that? **A.** Yes.

**Q.** He asked you whether you can have those two diseases at the same time. **A.** No, I say they are two diseases. You do not have them together.

*By Mr. Behrens.*

**Q.** You cannot have them together? **A.** It is pretty hard to pin down medical testimony. Medicine is not an exact science. I cannot give you a comparison in medical terms as to that. It is not a cut-and-dried business like this piece of wood (indicating).

**Q.** Are there any definite symptoms which the medical profession requires to be present before you are justified in diagnosing a disease as neurocirculatory asthenia? **A.** Yes. 396

**Q.** What are those, Doctor? **A.** Nervousness, irritability, excitability, sweating of the hands; oftentimes belching, practically anything that excites a person. It is not a definite disease. It is a syndrome. We call it neurocirculatory asthenia. It is a complexity of symptoms. These fellows have not got that ability to concentrate and do things, I would say, at times.

**Q.** Would a man who was in the hospital waiting room with his wife inside having a baby and he is pacing up and down and his hands are clammy and wet and if you get him to sit down and he puffs nervously on a cigarette, would that be one of these neurotic conditions? **A.** That is a different thing. That is a syndrome that we know medically. 397

**Q.** Where does it differ from the one I have just indicated? **A.** It is not a disease, a certain set of symptoms that people get when they are confronted—it is not a psychosis.

**Q.** Would you call it an anxiety neurosis or an anxiety complex? **A.** It is a temporary complex. It is not a disease or symptom. It is a normal reaction.

Q. Wherein do the symptoms that I have just mentioned there differ from the symptoms you related for a person having this disease, this neurocirculatory asthenia? A. A series of symptoms that come on over a period of years where a man shows some symptoms over a long period of time, where the blood pressure rises and goes down, where the pulse runs away, I tried to explain that that is not a disease. It is a regular normal thing. For example, it is a set of symptoms that we designate as neurocirculatory asthenia that we are talking about.

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Q. That is different from a fear psychosis, I assume? A. Very often neurocirculatory asthenia develops into a fear psychosis.

Q. What are the symptoms that you notice so that you can tell when the change takes place? A. When a man starts to act in such a way that we do not consider him normal; when a man decides to take his life.

Q. Is a man with this neurocirculatory asthenia then a normal man? A. They are normal men and are suffering from a set of symptoms which we call a certain type of neurosis.

Q. It is quite common among the population? A. It is not very common.

Q. Yet one who has it is perfectly normal? A. They are not normal.

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Q. Would you tell me when you can see this change from the psychosis to the fear neurosis? A. I have answered that question a dozen times.

The Court: Answer it again, Doctor. Let's not argue about it.

A. (Continued). When the man starts suicidal tendencies, maniacal tendencies.

Q. Did this defendant show any tendency of a maniac when you saw him? A. When a man attempts to commit suicide he shows signs of mania.

*Howard Gilman—For Defendant—Cross—Redirect.* 601

Isn't it a fact that one who positively threatens to commit suicide never does, but one with a psychosis is the one who commits suicide? A. I beg to differ with you.

What other tendencies of the character of a maniac you see in this man when you examined him over these years? A. I have answered that question.

What other ones? A. There are no other ones.

The Court: Counsel did not say there was such an attempt.

The Witness: There was an attempt. He said he threatened to commit suicide.

You never saw him attempt to do that? A. I did not see any attempts, no. 602

Mr. Behrens: I think that is all.

Mr. Cahill: I have one more question, Doctor.

*Direct examination by Mr. Cahill.*

In March of 1937 did the defendant again ask for an examination by a heart specialist? A. He did.

Before the one made by Dr. Hyman? A. I had another consultation in March, 1937. That was the time he was examined by the New York Life Insurance Company and was told he had a coronary disease. And then was the time when he really started going bad. He was afraid of as going to drop dead, but there was nothing the matter with him. 603

Is that report that you have in your hand the one that Dr. Hyman gave you, dated March 27, 1937? A. That is the report and his signature. I recognize the signature.

Did you discuss with him the report of April 31, 1935? A. I did.

And the report of March 27, 1937, did you discuss it with Spies? A. I did.



Q. Did you explain them to him? A. I did.

Q. Did you advise as to whether he had any heart disease or not? A. In fact Mr. Spies has read my records. He has read these cards from 1934 on to date. He has read every one of these consultations and he wanted to have everything explained to him.

Q. And you did explain things to him? A. I explained everything I had, showed him the picture of his heart in 1935 and 1937, which are identically the same, and I convinced him that a man with heart disease, that it usually becomes that way through a strain. This shows the size of the heart identically the same in 1935 and 1937. I had  
605 an electrocardiogram examination which we used showing that the man has no disease of his heart, especially no organic disease, and it shows a normal electrocardiogram in 1935 and a normal man in 1937.

Q. Without giving any further details, Doctor, on March 27, 1937, did he express to you any of his fears of death or anything of that sort? A. He did.

Q. During 1937? A. During 1937. I have the records here. I can read the records.

Q. I will just content myself with the answer to that question.

Mr. Cahill: I offer the reports in evidence.

Mr. Behrens: I feel they are irrelevant and that  
606 they are also hearsay, but I will concede that they be offered.

(Marked Defendant's Exhibits G and H.)

Mr. Cahill: That is all.

Mr. Behrens: I would like to put these cards in evidence, if I may—I would like to have them marked for identification.

(Marked Government's Exhibit 56 for Identification.)



*Recross-examination by Mr. Behrens.*

Q. Doctor, with reference to Government's Exhibit 56 for Identification, does that exhibit contain all of your records? A. Oh, no.

Q. Of Mr. Spies? A. This is most of the records up to 1939, but there is another record which was not returned to me, used before. That showed the dates of consultation right up to 1941. This record only shows up to January, 1939. But there is another slip some place showing this practically up to 1941.

Q. For what did you treat him about ten days ago? A. He had a cold and grippe. He was ready at any time, but I fully warned him—the idea of my certificate was that he was not in condition to go ahead, so I guess you did postpone it a day or so so he would be able to go on.

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Q. Was that neurocirculatory asthenia? A. No, it was grippe.

Q. Do you recognize this Exhibit 56 as part of your records covering— A. 1932 to 1939.

The Court: Complete for that period?

The Witness: Yes, complete for that period.

Mr. Behrens: I will offer Government's Exhibit 56 for Identification.

The Witness: I will qualify that. Every one of my consultations are not in the record or I would have to have a record of about twenty of them. I do not have every record. If I were to have I would have to bring my records for the last eight years.

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(Government's Exhibit 56 for Identification now received in evidence.)

Q. How did you receive the information that Mr. Spies was rejected for insurance in 1937 on account of coronary

thrombosis? A. I got a letter from the New York Life Insurance Company saying that he had been rejected because of a coronary—I would like to have those cards. I will read it, exactly what I have here.

Q. I show it to you, Doctor. The date of it is March 27, 1937, on these cards. A. It is marked March 27, 1936 "Defendant again was examined by New York Life Insurance Company and rejected because blood pressure of 168." This was their record in their letter. "Pulse of 116. The cardiograph gave it and stated and suggested coronary thrombosis."

611 I telephoned them, the medical department, and they said that they were not afraid of the electrocardiograph but that they had rejected him because of a heart murmur and high blood pressure and a rapid pulse. From his findings—it is in front of me, it was that he had a coronary thrombosis.

Q. Is that the one that he got from the insurance company or what? A. He got it from his broker—from his broker. As a result of it I wrote to the New York Life Insurance Company requesting a copy of their finding and they sent me a letter.

612 Q. Do you have that letter? A. I do not have it. It must be some place in the records. This was made so I could refresh my memory. All of my records were taken the last time. I do not have any of my records. I remember the letter definitely of the New York Life Insurance Company. They must have a copy of their own, copy of the letter that was sent to me.

I called them up requesting an explanation of the coronary thrombosis. This is the answer of the director, as the result of which he was convinced that he had coronary thrombosis. Somebody told him he had what he did not have. That is why I took him to Dr. Hyman for a re-examination.

Q. As to this coronary rejection, was the rejection of the life insurance company because of coronary thrombosis, or from Mr. Spies himself? A. That is right.

Q. Continue, Doctor. A. He had been turned down for insurance.

The Court: Do not volunteer and we will save time. He wants to know whether it was from the defendant or the insurance company. That is all. What is the answer?

The Witness: From the defendant.

The Court: Stop at this point and wait for the next question. I do not mean to exclude you, but I want to save time. 614

Mr. Behrens: That is all.

Mr. Cahill: That is all.

The Witness: I have been trying to cooperate.

The Court: I know.

We will take a recess until 11.00 o'clock tomorrow morning.

(Adjourned to Wednesday, August 13, 1941, at 10.30 A. M.)

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New York, August 13, 1941;  
11 A. M.

615

TRIAL CONTINUED.

The Court: I thought you were going to recall your witness and conclude the cross-examination.

Mr. Cahill: Their cross-examination?

Mr. Behrens: Yes, your Honor.

The Court: Very well. You may proceed.

MURRAY R. SPIES resumed the stand.

*Cross examination (continued) by Mr. Behrens.*

Q. Mr. Spies, I believe yesterday I showed you certain checks and papers, Government's Exhibits 52 and 53 for Identification. Do you recall that? A. Yes, sir.

Q. Did you identify those as being checks of the United Sponsors? A. I did.

Q. Did you also recognize the vouchers in these two exhibits as being vouchers of the United Sponsors? A. That I do not know.

617 Q. You are not familiar with the records of United Sponsors? A. Not thoroughly.

Q. Do a great many of these checks, these exhibits, bear your signature? A. Yes, sir.

Mr. Behrens: I will offer Government's Exhibits 52 and 53 for Identification in evidence.

Mr. Cahill: No objection.

(Government's Exhibits 52 and 53 for Identification now received in evidence.)

Mr. Behrens: I understand there is no objection from counsel to the receipt of these two exhibits.

The Court: Exhibits 52 and 53 are now in evidence.

618 Q. You recall yesterday, Mr. Spies, we were discussing these various insurance applications? A. Yes, sir, I do.

Q. I show you what purports to be an application made to the Prudential Insurance Company of America dated March 4, 1931, and I ask you whether you can identify that?

A. It has my signature, Mr. Behrens.

Q. On the third page, does your signature appear again? A. Yes, sir.

Q. And the answers to the questions appear on page 3 and are certified by the doctor before you signed them?

Mr. Cahill: Is that 1931?

Mr. Behrens: Yes, sir.

Mr. Cahill: I suggest that a detailed examination of the applicant at that time would not be relevant to the condition in 1936 and 1937. There was a passing reference to these things, I think largely on cross-examination, which shows something about that. I do not think anything contained in the application is relevant.

The Court: Mr. Cahill, the defendant, I believe, offered proof yesterday of his condition in 1932, as far back as that, I think, approximately 1931 and 1932, and that may be introduced on the question at least of 620 credibility.

Mr. Cahill: There was no introduction of evidence for any purpose in 1931 or 1932 except possibly a question or two to lead up to the consultation of doctors and was offered for the purpose of showing his condition in 1936 and 1937. The medical testimony was limited to that except for a few references of Dr. Gilman to the effect that in 1932 he was consulted and from 1934 on he treated him.

The Court: Your physician did testify with reference to your question to a consultation in 1932. I think on that issue, while 1931 does seem rather remote from 1936 and 1937, you have brought it down to 1932. I think I will permit the Government to say what they 621 propose to show. I do not know what it is as to 1931. I assume it has some bearing on the credibility of the alleged statements made by this witness to the doctor in 1932.

Mr. Cahill: I respectfully except.

A. Yes, I identify those. Is that the question, Mr. Behrens?

Q: The question, Mr. Spies, with reference to page 3. The doctor asked you questions and put down answers and then you signed it. A. Yes, but he put down the answers in summarized form, the answers I gave, and then I signed it.

Q. Is it your recollection, Mr. Spies, that on this application a policy was actually issued to you? A. I have no recollection of that. I do not believe the policy was issued, however.

Mr. Behrens: I offer this in evidence.

The Court: He is taking an objection to that?

Mr. Cahill: Same objection.

The Court: Overruled. I will grant you an exception.

(Marked Government's Exhibit 57.)

Q. What is your best recollection as to the date when this policy that you say was issued actually was issued to you and when it lapsed? A. The first one—there was one, I believe, in 1928.

Q. Yes? A. That one lapsed.

Q. You never received another insurance policy after 1928 until along about 1938 or 1939, is that right? A. In 1932 there was a policy offered to me on a nine-year rate basis.

Q. This is my question: I am speaking about the issuance of a policy to you between 1928 and 1938? A. The one I accepted, you mean?

Q. Yes. A. I do not believe from that time until 1939.

Q. I show you a photostatic copy of what purports to be an application to the New York Life Insurance Company dated May 16, 1932, and I ask you whether that is your signature which appears upon the first page? A. It is.

Q. With reference to the third page, do you recall the doctor asked you questions and put down answers and



thereafter you affixed your signature to that page? A. I make the same answer on this one that I did on the other. The doctor asked me questions and summarized my answers and then I signed the application.

Q. Is that the application upon which the insurance company offered you a policy but at a higher rate than the rate for a man of your age at that time? A. That I do not know, Mr. Behrens. I know that on an application in 1932 to the New York Life they offered me a nine-year rate policy, which I believe I refused.

Q. Do you have any recollection of any other application in 1932 to the New York Life than the one you now have in your hands? A. No, sir, I do not.

626

Mr. Behrens: I will also offer that in evidence.

Mr. Cahill: I make the same objection.

The Court: Same ruling.

Mr. Cahill: What is the date?

Mr. Behrens: It is dated May 16, 1932. That is the date of the application.

Mr. Cahill: All right.

(Marked Government's Exhibit 58.)

Q. Now I show you what purports to be a photostatic copy of an application made to the Equitable Life Assurance Society of the United States, dated October 7, 1932, not signed by you, to which is attached what purports to be your medical history and so forth on page 3. Can you identify it, Mr. Spies? A. This bears my signature, Mr. Behrens.

627

Q. Would you say that on that occasion the doctor asked you questions and you gave answers and he put down the substance of your answers and you signed it? A. He put down in summarized form what he believed to be my answers to the questions.

628

*Murray R. Spies—Defendant—Cross.*

Q. Is there any question that the doctor put down the answers which you did not give him? A. I doubt very much whether he would have done that.

Q. You do not dispute the substantial accuracy of this exhibit? A. I cannot say on that. I know in all cases, most cases, the doctor asked questions and I gave him what I believed to be an honest answer and he put the answer down and he submitted it to me and I signed it. Whether I read each paper or not, I do not know, but I know he asked me for information and that is my signature.

629

Mr. Behrens: I offer this one in evidence. The date of the application is October 7, 1932.

Mr. Cahill: I make the same objection.

The Court: Same ruling.

Mr. Cahill: The same exception.

(Marked Government's Exhibit 59.)

Q. I show you what purports to be a photostatic copy of an application to the New York Life Insurance Company dated April 25, 1933, and I ask you whether you recognize your signature on the first page of that application? A. That is my signature.

Q. Will you turn to the third page, please? A. Yes.

Q. Do you see your signature there again? A. I do.

630

Q. On that occasion is it your recollection that the doctor asked you questions and you gave him answers and he put the answers down and thereafter you signed your name to it? A. I make the same answer as before, Mr. Behrens.

Mr. Behrens: I will offer it in evidence.

Mr. Cahill: I make the same objection.

The Court: Overruled.

Mr. Cahill: The same exception.

(Marked Government's Exhibit 60.)

Q. Now Mr. Spies, I show you a photostatic copy of what purports to be an application to the Metropolitan Life Insurance Company, dated June 2, 1933, and I ask you, whether your signature appears on the exhibit? A. It does.

Q. Did you appear for examination pursuant to that application? A. I have no recollection on that subject except that which I gave here the last time, Mr. Behrens.

Q. Do you have a recollection of always appearing for examination when you had made an application for insurance? A. No, I do not think so. I think there may have been one or two cases when I refused to go to the home office.

Mr. Behrens: I will offer this in evidence, dated June 2, 1933. 632

Mr. Cahill: Same objection.

The Court: Same ruling.

Mr. Cahill: The same exception.

(Marked Government's Exhibit 61.)

Q. Now I show you, Mr. Spies, what purports to be an application to the Equitable Life Assurance Society of the United States, dated March 6, 1936, and I ask you whether you can identify your signature on that application? A. Yes, sir.

Q. Will you turn to page 3 and see if your signature appears again? A. Yes, sir.

Q. On that occasion did the doctor ask you questions and put down the answers and then after that you signed the page? A. I make the same answer, Mr. Behrens. 633

Mr. Behrens: I offer this application in evidence. It is dated March 6, 1936.

Mr. Cahill: I do not object to that.

(Marked Government's Exhibit 62.)

634

*Murray R. Spies—Defendant—Cross.*

Q. Mr. Spies, I show you a photostatic copy of what purports to be an application to the New York Life Insurance Company, dated January 8, 1937, and ask you whether you can identify your signature on the first page? A. I do.

Q. Do you find your signature also on the third page? A. I do.

Q. On that occasion did the doctor ask you questions and put down the answers and then did you sign it? A. I make the same answer, Mr. Behrens.

Mr. Behrens: I offer this in evidence. It is dated January 8, 1937.

635

Mr. Cahill: No objection to that.

(Marked Government's Exhibit 63.)

Q. Mr. Spies, I show you what purports to be a photostatic copy of an application to the Security Mutual Life Insurance Company, dated July 22, 1938, and I ask you whether you can identify your signature on that? A. I do.

Q. Will you turn to the second or third page and find your signature again? A. I do.

Q. On that occasion did the doctor ask you questions and put down the answers and then after that did you sign it?

A. No, sir, I do not believe I did on this one.

Q. May I see it?

636

(Document handed to counsel.)

Q. Do you see your signature on page 2? A. Yes, sir.

Q. Is it your testimony that the doctor did not ask you any questions on that occasion? A. I believe that the doctor did not ask all of these questions and I did not answer all of these questions. If he asked any of them, it is my recollection I may have signed this on the application at the request of the doctor.

Q. Did you appear before the doctor for examination pursuant to that application? A. I think I did.

Q. Could you give us the name of the doctor before whom you appeared? A. I could not, Mr. Behrens.

Q. Do you find his signature attached thereto? A. What; this here on the left (indicating)?

Q. Yes. A. Yes.

Q. I would like to read to you the questions or the printed part of this statement. Right above your signature appears this language:

"I hereby declare that I have reviewed and understand all of the above questions and answers thereto and same shall be made a part of my application for insurance in the Security Mutual Life Insurance Company of Binghamton, New York, and all such answers and each of them as written here are true and that I am the person described above, and that the answers appearing on pages 1 and 2 of my application are answered and then I signed the same." 638

In view of that statement is it still your testimony that the doctor did not ask you the questions on this occasion but wrote down the answers and then you signed it? A. My answer is the same.

Mr. Behrens: I would like to have this marked for identification.

The Court: Why don't you offer it in evidence?

Mr. Behrens: I will offer it in evidence.

Mr. Cahill: Which one is it? 639

Mr. Behrens: Security Mutual.

The Court: There is no question that the defendant signed it?

The Witness: No, sir.

Mr. Behrens: No.

Mr. Cahill: What year?

Mr. Behrens: July 22, 1938.

Mr. Cahill: There have been objections on the part of the Government to going beyond the period alleged in the indictment.

The Court: Any application and the test as to the application of 1936 and 1937, it would be admissible on the ground that it is an admission?

Mr. Cahill: I will just state my objection without arguing and take an exception.

The Court: Very well.

(Marked Government's Exhibit 64.)

Q. Was the policy issued, Mr. Spies, pursuant to that  
641 last application that has just been marked in evidence?

A. I do not believe so, Mr. Behrens.

Q. Were you rejected? A. I think so.

Q. Now, I show you what purports to be an application or photostatic copy of an application to the Manhattan Life Insurance Company, dated December 29, 1938, and I ask you whether you identify your signature on the first page of that? A. I do.

Q. Will you turn to the next page, please, and do you see your signature there again? A. I do.

Q. On that occasion did Dr. Wilson ask you the questions and put down the answers to the questions and then you signed it? A. I have no recollection, Mr. Behrens, as to Dr. Wilson at all.

642 Q. It has Dr. Wilson's name on it? A. Yes, sir, Wilson has his name. May I elaborate a little bit on this?

Q. No. I would like for you to answer the questions. A. My answer is that I have no definite recollection about it.

Q. You may have given the answers that he put down before you signed it? A. I may have given some of the answers.

Q. And not give all of the answers? A. I do not believe I did.



Q. Would you say some of the answers you did not give him? A. Yes, definitely.

Mr. Behrens: I offer it in evidence.

Mr. Cahill: What is the date?

Mr. Behrens: Application dated December 29, 1938.

Mr. Cahill: I make the same objection. Is that the Manhattan Life?

Mr. Behrens: That is the Manhattan Life.

The Court: December 29, 1938!—

The Witness: Yes, sir.

(Marked Government's Exhibit 65.)

644

Q. Was an insurance policy actually issued to you, Mr. Spies, pursuant to that last application? A. There were two rated policies issued.

Q. Mr. Spies, I believe yesterday there was some discussion or testimony with reference to a \$25,000 annuity which you took out in the year 1936 in the Equitable Life Assurance Society of the United States? A. Yes, sir.

Q. I show you a photostatic copy of what purports to be an application for a \$25,000 annuity policy in the Equitable Life, dated July 9, 1936, and another dated July 25, 1936, and also what purports to be an annuity policy which was issued pursuant to these applications, and I ask you whether you can identify those documents? A. I identify my signature on the first and second pages. As far as the annuity is concerned, Mr. Behrens, I cannot in the absence of the signature, I cannot identify it. But I do not question it if this is a photostatic copy of the actual policy issued.

645

Mr. Behrens: I will offer that in evidence.

Mr. Cahill: What was the answer to the last question?

Mr. Behrens: In the absence of a signature by the witness he could not positively identify it, but does not question it as a photostatic copy of the original.

The Witness: That is the annuity policy itself, Mr. Behrens?

Mr. Behrens: Yes, your signature I understand appears on the first two pages of this exhibit.

Mr. Cahill: No objection.

(Marked Government's Exhibit 66).

647 Q. With reference to Government's Exhibit 66 now in evidence, will you tell me why it was that in July, 1936, you filled out two applications for the same annuity policy, Mr. Spies? A. I have no recollection concerning the two, but I think probably the agent submitted it to me and I did whatever he suggested.

Q. Did the agent tell you at that time by re-dating the application you would thereby save interest on this \$25,000 between the two dates of the original application and the other application? A. I have no recollection on that at all.

Q. You have no idea what the purpose of the two applications was in the case of the annuity? A. No, sir, I have no idea at all.

Q. Referring again to Government's Exhibit 66, I show you the second page entitled "Change of Beneficiary Register". Would you look at that, please? A. Yes, sir.

648 Q. Did you see that on the original? A. I cannot recall, Mr. Behrens.

Q. This indicated that on June 17, 1937, the beneficiary of this policy was changed, is that correct? A. Yes, sir.

Q. Does that recall anything to your mind? A. No. The only thing it recalls is that, and this is hearsay, that it had something to do with the loan at the bank.

Q. Very well. Do you recall in the early part of June, 1937, having a conversation with a man named Mr. Lester Einstein in connection with getting a loan on this policy?

A. I believe I do. I believe I had conversation with Mr. Einstein.

Q. Do you recollect or do you recall that a part of that conversation with him had to do with the additional rate of interest which would be charged by the insurance company and would not be charged by the bank? A. I think so.

Q. Is that your recollection that the insurance company would require you to pay 6 percent interest on a loan against this annuity whereas a cheaper rate might be obtained at the Manufacturers Trust Company? A. I do not believe he asked definitely—that there was any substantial difference.

Q. Do you recall that Mr. Einstein told you that he knew Mr. Selling of the Manufacturers Trust Company and that you might be able to obtain this loan, that he might be able to obtain it for you? A. I really do not recall him particularly talking about Mr. Selling, through Mr. Einstein.

Q. When would you say you met Mr. Selling for the first time? A. It was probably between June—either before I was stricken with sciatica in June, June 4th or 5th, or after I got out to go to Washington, which was June 25th. I do not believe it was between June 4th and June 24th.

Q. Is it your recollection that the matter concerning the change of the beneficiary in this policy came to you before or after you met Mr. Selling? A. I have no recollection whatever, Mr. Behrens.

Q. Will you tell us where you first met Mr. Selling? A. I think I met him first at his bank.

Q. On that occasion did you discuss with him the question of obtaining a loan on this policy? A. I think the matter had been handled almost entirely by Mr. Einstein and it had been arranged so that all we had to do was to sign a note. I think that discussion could not have lasted more than five or ten minutes.

Q. In view of your statement would you tell us that the date of your first meeting with Mr. Selling is a date later

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than June 17, the date when you changed the beneficiary on this policy? A. That is my feeling on it, although I have no definite recollection on it, that I met Mr. Selling either before June 4 or after June 24. That is the only answer I can give to it, Mr. Behrens.

Q. Let us go back a little bit, then. When you first met Mr. Selling all you had to do was to sign the papers? A. That is my recollection.

Q. And you got the loan on July 1, 1937, is that correct? A. I believe it was July 1st or 2nd.

Q. Would the records of the bank assist in refreshing your recollection? A. If you say it is July 1st, it is all right with me, Mr. Behrens.

653 Q. Would you say that was your first meeting with Mr. Selling? A. I really would not say. I may have met Mr. Selling before June 4th and then July 1st—after June 24th.

Q. Will you tell us what was the conversation you had with Mr. Selling the first time you met him? A. It was, I think, almost questioning him as to how his wife was feeling and how he was feeling and I was feeling.

Q. Was anything said about your getting a loan on this annuity? A. I think, Mr. Behrens, that that had been arranged for most completely by the time that I got to the bank. I do not doubt that we had some discussion, of course, about the policy and the note and the rate of interest and that sort of stuff.

654 Q. You probably had two meetings with Mr. Selling; one early in June where you discussed the state of health of one another and then one on July 1st when you actually got the loan? A. The discussion as to the state of health was when we got the loan.

Q. That was July 1st or 2nd, is that right? A. That is right, July 1st or 2nd.

Q. Go back and tell me whether you met him before July 1st or 2nd? A. I say—you got to realize, Mr. Behrens, I am

judging this thing by the period of actual confinement from seiatika, which is June 4th to June 24th.

Q. Any answer we get here is not going to tell us any activity of yours between those two dates? You are going through the mental operation to exclude the dates?

Mr. Cahill: I object to that. He may have gone to talk about a mental operation, not insanity.

The Court: It is proper cross-examination, insanity.

Mr. Cahill: I do not think it is incorporated in the issues here. I respectfully except.

A. I want to answer your question.

656

Mr. Behrens: Would you please read the last question to him?

(Record read.)

A. The answer, please, is this—

Mr. Behrens: I believe the question has already been answered.

The Court: I will let the witness explain it.

Mr. Behrens: All right.

A. (Continued) As far as the activity of mine, as far as Mr. Selling was concerned, it must be excluded because I did not get out of bed for that three-week period. I do not think I could have met him between June 4th and June 24th.

657

Q. Can you tell us whether you met him between June 1st and June 4th? A. No, sir, I have no recollection of meeting him.

Q. Would you say that practically all details of this loan were handled by Mr. Einstein? Is that your recollection?

A. As I recall it the major part of the work had been done when I got to the bank. It apparently was satisfactory to Mr. Selling that the loan be made.



Q. Who was it who told you that you would have to change the beneficiary on this policy before you could get the loan? A. It may have been Mr. Einstein or Mr. Selling, or it may have been both, Mr. Behrens.

Q. Would you tell us the approximate time when you received that information? A. No, I cannot say. It must have been before July 1st.

Q. Would you judge some time in the month of June? A. Yes, I would say so.

Q. I show you what purports to be a photostatic copy of the request for change of beneficiary, addressed to the Equitable Life Assurance Society of the United States, dated June 14, 1937, and I ask you whether you recognize your signature on that exhibit? A. That is my signature.

Mr. Behrens: I offer it in evidence.

Mr. Cahill: No objection.

(Marked Government's Exhibit 67.)

Q. Would you say, Mr. Spies, that you were probably at home ill with sciatica when you received information from some source that the loan could not be made as matters then stood? A. I say that I was home sick with sciatica from June 4th to June 24th continuously, as I recall it, and undoubtedly during that period named, and the improbability of learning that and the impossibility of it came to me during that period.

Q. What is the difference between improbability and impossibility? Either it was good collateral or not? A. There was no question of collateral, as I said, but there was some adequate reason why the change had to be made. As I understand it, Mr. Einstein recommended it and it was done.

Q. As originally drawn, is it not true that under certain contingencies your children, who were minors, might become interested in the proceeds of the policy? A. That is a fact, I think.



Q. Isn't it a fact that the bank refused to advance any money on this collateral unless it got the signatures of all persons who might be beneficially interested in the policy?

A. I have no definite recollection of that, Mr. Behrens. I allowed Mr. Einstein, I believe, to make the recommendations, and I signed, probably, whatever he submitted to me.

Q. I assume that this signature was affixed during the period when you were ill with sciatica? A. Yes.

Q. Have you any doubt but that that is actually right?

A. I have no recollection whether it was June 14 or any date in June, except as I say today.

Q. Do you have any reason to doubt it, Mr. Spies? A. No opinion other than that, Mr. Behrens.

662

The Witness: May I say a word to Mr. Cahill, openly, not in secret?

The Court: If Mr. Cahill wants it, all right.

The Witness: I want to remind you that Dr. Jewett and Dr. Sharpe are here, I notice.

Q. Yesterday I believe at one point we were discussing your interest in National Fund? A. Yes, sir.

Q. Will you tell us, please, just what National Fund was?

A. National Fund was an investment fund which was started by Mr. Davis, Mr. W. H. Davis in, I believe, 1935, registered it with the Securities and Exchange Commission. It was an elaborate sort of fund, because it had warrants attached to it, by which warrants you had the right to buy the securities at a higher price and the value of the securities represented that price, in spite of the fact that he may have paid a smaller price. That is the way it was registered.

663

Q. Would you call them speculative warrants? A. I beg your pardon?

Q. Because of the presence of the warrants, would you call it a speculative trust? A. I do not know whether it

was more speculative than the Listed Securities, but you would not call it standing alone a highly speculative trust.

Q. When you first met Mr. Davis in connection with this National Fund, what was the financial condition of National Fund?

Mr. Cahill: I think that the condition of the fund, anything resulting from proof as to that, is entirely irrelevant.

Mr. Behrens: Perhaps I better ask a few more questions on that.

The Court: I will sustain the objection for the present.

Q. When did you first become interested in National Fund from the standpoint of being an officer, director or stockholder of it, Mr. Spies? A. I think it was in the early part of 1937, either January or February.

Q. Do you recall ever paying any money to Mr. Davis in order that you might come into the National Fund Company? A. Yes.

Q. How much did you pay him? A. I think it was about \$1,500.

Q. What was that money paid to him for? A. It was paid, I believe, for a contribution as to the expenses. I was to come into National Fund and be a director with him and with Mr. Keane and Mr. Taylor, who were to go ahead and distribute National Fund on a national basis. He told me nothing, however, except I would have the right to come in as a director.

Q. Did Mr. Davis tell you why he was willing to bring you into National Fund? A. I do not recall that he did. Mr. Behrens.

Mr. Cahill: Just a moment. I think that is immaterial.

The Court: The answer has made it immaterial.

Mr. Cahill: I want to take a new objection as to this line of questioning.

Mr. Behrens: I would like to have that objection a little more clearly stated. You do not say what the line of questioning is here.

The Court: You put your next question and I will rule on it. I will judge the question.

Mr. Cahill: The point is that whatever may have been in the mind of Mr. Davis before the proposition was made—

The Court: That is not what the question stated. Did Mr. Davis tell you, as I heard the question, why he invited you into the picture.

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Mr. Cahill: It would be clearly irrelevant.

The Court: It may be irrelevant but no objection to disclosing the contents of the mind.

Mr. Cahill: The expression "contents of the mind", I object to that also as irrelevant.

Q. Was any part of your arrangement with Mr. Davis that when you became a member of the board of directors of National Fund, which he controlled, that practically simultaneously to that he would become a director of the First Mutual Corporation? A. I think that was at my instance because—

Q. Was that part of the agreement, Mr. Spies? A. You mean part of the actual written agreement?

669

Q. Did you have a written agreement with Mr. Davis? A. My recollection is that we did.

Q. Do you have it here? A. No.

Q. Do you know where it is? A. I think it may be in the books.

Q. In the minute books? A. Whatever records you have, and you have had the records for a couple of years.

Mr. Behrens: I ask the witness not to volunteer any such information.

Mr. Cahill: I think the statement is clearly wrong and I think perhaps improper.

The Court: The witness will be instructed not to volunteer either on cross-examination or on direct. The witness' duty is to answer questions addressed to him and none other.

Mr. Cahill: Will your Honor also suggest to Mr. Behrens that he refrain from characterizing anything as to it being accurate or inaccurate because he is not on the witness stand.

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The Court: That is a matter I will have to address myself to. The witnesses do not cooperate by volunteering information. I want only responsive answers to questions, and counsel are in charge of the proceeding and not the witness.

The Witness: I shall watch it, your Honor.

Q. In any event did Mr. Davis actually become a director of the First Mutual Corporation at or about the time you became a director of National Fund? A. I believe he did, within a month anyway, Mr. Behrens.

672

Q. I show you what purports to be a check dated February 18, 1937, drawn on the Bank of Rockville Center Trust Company to the order of First National. The charge is in the amount of \$1,907.50, and I ask you whether you can identify that check? A. I do.

Q. Can you tell us what that check was intended for? A. Yes, I think it was in payment for about 1750 shares of the stock of National Fund at its then liquidating value.

Mr. Behrens: I will offer this check in evidence.

Mr. Cahill: I object to it for the reason that while this paper in itself may not be the basis of a very serious objection, that it may lead to a great many irrele-

vant things with which we are not concerned in the issues in this case.

The Court: I will receive it, overrule the objection, for the purpose of indicating the business activity on the part of the defendant within the period in issue.

Mr. Cahill: I take an exception.

(Marked Government's Exhibit 68.)

Q. You have mentioned, Mr. Spies, a corporation named First Mutual. Will you tell us who owned all of the outstanding stock of the First Mutual? A. That was closely held, substantially between Mrs. Spies and myself and several of the directors—Mr. Keane.

674

Q. Did you and Mrs. Spies own the majority of the stock? A. Of course.

Q. The directors held it to aid them to qualify as a director? A. They had more, but to the same effect. We were the substantial owners of that corporation.

Q. When did that come into existence, Mr. Spies? A. I think it was in December, 1936, under the name of—excuse me. May I go ahead on that answer?

Q. I think you are giving us the name that it was changed to in March, 1937? A. Yes, but I do not want to volunteer now.

Q. I appreciate that. Will you tell us when the name was changed? A. In March of 1937, I believe.

Q. What was the new name of the corporation? A. First Mutual Corporation.

675

Q. Originally it had been what? A. Distributors Fund.

Q. Would you say that along about the early part of 1937 you had a discussion with a representative of a corporation known as Distributors Group, Inc.? A. I did.

Q. Will you tell us what the substance of that conversation was? A. The name that we had adopted, Distributors Fund, Inc., resulted in some conflict with their name be-

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*Murray R. Spies—Defendant—Cross.  
Dr. Stephen P. Jewett—For Defendant—Direct.*

cause they were engaged in the same kind of business, and asked if we would change our name to a different name, and we said we would be glad to do it on payment of the costs of the change. That was \$250, as I recall. We agreed, and we proceeded to change the name.

(Discussion at the bench, off the record.)

(Short recess.)

677

The Court: For the convenience of a physician who is practicing, counsel have requested that we take him out of order, as we did on yesterday, so while the examination is not concluded as to the defendant, counsel for the defendant wants to call a physician to the stand, and I have allowed him to do it.

Mr. Cahill: Mr. Spies had to go out a moment.

The Court: That is perfectly all right. We will wait.

DR. STEPHEN P. JEWETT, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

*Direct examination by Mr. Cahill.*

678

Q. Doctor, are you a physician duly licensed to practice medicine in the State of New York? A. I am.

Q. How long have you been a member of the medical profession? A. Since 1910.

Q. Will you state briefly your education and experience? A. After graduation from a duly incorporated medical college I became licensed to practice medicine in the State of New York, and have practiced continuously since that time. Since 1915 I have been practicing exclusively in the field of mental and nervous diseases, during which time I have been connected with a great many institutions and specialized in



the particular field of mental and nervous disorders at various institutions and colleges and so forth, such as Bellevue Hospital, United States Veterans Hospital and a great many other clinics.

At the present time I am professor and head of the department of psychiatry at the New York Medical College. I am chief psychiatrist at the Metropolitan Hospital. I am director of psychiatry and the division of neuropsychiatry at Murray Hill Hospital; director of the psychiatric division at the Flower and Fifth Avenue Hospitals. I am a qualified examiner in lunacy and mental defects under the State Department of Mental Hygiene and also specialize—

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The Court: Speak up a little.

A. (Continued) I am a qualified examiner in lunacy and mental defects in the New York State Department of Mental Hygiene, and various other things, if you wish them.

Q. Does your field include also neurology? A. Neurology and psychiatry.

Q. Doctor, assume that the defendant, Murray R. Spies, was born in 1901; that he engaged in various occupations for years while fitting himself to become a lawyer and worked for other lawyers, had a small law office; assume that in the year 1931 his application for life insurance was rejected on account of no definite heart condition but that in a rejection on other applications for life insurance, seven or eight times, he received information that the rejection 681 in one instance in February or March, 1937, was due to a coronary heart disease; that in other instances the rejection, according to his information, was based on high blood pressure, rapid pulse, a form of vertigo and heart murmur, and that these rejections occurred during the years from 1931 to 1938; assume that he married in 1922 and that in 1936 he had a wife and two children; that he was a man of moderate income during this period—

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*Dr. Stephen P. Jewett—For Defendant—Direct.*

Mr. Behrens: I object to that portion of the hypothetical question, that he was a man of moderate income, the testimony being that in 1935 his income was at least \$11,500.

Mr. Cahill: I will qualify that.

The Court: Is it important to your question?

Mr. Cahill: No.

The Court: You will disregard that portion of the question.

683

Q. (Continued) That he did work for a number of corporations known as investment trusts and investment-holding organizations, and he obtained in one transaction approximately \$40,000 for himself—\$38,000 for himself; that he called this the most important transaction of his life and called in a physician—

Mr. Behrens: I object to that.

The Court: The witness has testified to that.

Mr. Behrens: I do not recall it.

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Q. (Continued) —that the defendant called this the most important transaction of his life and called in a physician and expressed fear that he might not be able to complete the transaction because of fear of riding in subways and might have an impulse to jump in front of trains; that he also feared that he might act on the impulse and jump out of a window at a great height; assuming that he lived in almost constant fear of death and at times—

Mr. Behrens: I am afraid that is an inaccurate characterization of the witness' testimony, "almost constant fear of death".

The Court: It is fair direct examination. I will allow it.

Q. (Continued)—and that at times through fear of collapse he would lie on a couch in his office and dictate to a secretary while in that position; that he refused to go into restaurants and moving picture theatres through a sense of fear—

Mr. Behrens: I do not recall any such thing.

The Court: No moving picture theatres.

Mr. Cahill: It is not important. I will leave it out.

The Court: On occasions he refused to go into restaurants.

Mr. Behrens: There is testimony to that effect.

Q. (Continued) Assuming that he was advised by a number of physicians that his fear of death was mental, that he had no organic disease that would cause his sudden death; that his fear of death was due to the belief that he was suffering from heart trouble; that on a number of occasions he called in a physician for an emergency treatment at his office; that between the year 1932 to the year 1939 he consulted and was treated or advised by at least fifteen physicians—

686

Mr. Behrens: I do not believe there is testimony to that effect.

Mr. Cahill: I think the testimony is twelve to fifteen.

Mr. Behrens: We were given the names, I believe, of twelve physicians.

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Mr. Cahill: He did not name them all.

The Court: I think he said twelve to fifteen.

Q. (Continued) Assuming that one of these physicians prescribed for the patient a book called "Fear" by John Rathbone Oliver, and that the reading of the book was for the purpose of demonstrating that there was no definite physical basis for his fear and that he should follow the

mental statements suggested in such book; assume that he suffered from recurring attacks of sciatica for one period of three weeks and was ill from this disease and that during the time he complained of tremors and dizzy spells and was in fear of death without making provision for his wife and family; assuming that a considerable part of the \$40,000 or \$38,000, to be exact, which he had acquired was lost or spent by him during the years 1936 and 1937 through a business venture—

Mr. Behrens: The testimony was that the money was lost some time in 1937; the exact testimony as to that being that he lost all of that money—

The Court: Or spent it?

Mr. Behrens: —or spent it. I cannot recall any testimony with reference to his having lost any money in 1936 at all.

Mr. Cahill: That one of the commitments began in the latter part of 1936, and I can get the exact time.

The Court: Only a few hundred dollars testified to as having been spent at the end of 1936.

Mr. Cahill: There was testimony by Mr. Reighley as to a certain loss in 1936.

The Court: Of a small character.

Q. (Continued) —that a considerable part of this \$38,000 was spent and this business venture failed to go through or, as I have said before, this investment company in which he invested his own money failed and that upon his testimony he was dispossessed from his office—

Mr. Behrens: In 1937?

Mr. Cahill: I am not specifying the time. It is included in the whole period.

The Court: Can you specify the time? Undoubtedly you want an opinion based upon some period of time.

Mr. Cahill: Let me see the record as to that fact.

The Court: When he was dispossessed of his office?

Mr. Behrens: When he was dispossessed.

Mr. Cahill: That was some time—I believe Mr. Reighley based it—I think that was in 1938 and 1939.

Q. (Continued) —that he was suffering from extreme nervousness, had a high pulse, high blood pressure, having suffered from mental depression of some kind; that on one or more times he consulted a heart specialist with his own doctor; that after reading the book called "Fear" in the early part of 1938 his condition improved and his fear and nervousness diminished and the symptoms of high blood pressure and rapid pulse lessened and there was an improvement in his physical and mental tone, would you say, in your experience, doctor, what was the nature of this disease, if any, that caused the symptoms which he manifested?

692

The Court: First ask him whether on the basis of the question you put whether he can with reasonable certainty give you an opinion.

Q. Will you answer the Court's question? A. I would be glad to.

Q. Suppose you do. A. He was suffering with a mental disorder of a minor psychosis which we refer to as psychoneurosis, and that is characterized by morbid fears, morbid anxiety and it is accompanied by a rather wide variety of physiological and physical disturbances in the form of sweating, rapidity of heart action, gastro-intestinal disturbances and various other physical disturbances which the individual has due to an organic disease, as a rule, which in turn is due to his fears and anxiety thought. That in substance is the answer.

693

Q. Is procrastination a characteristic of that state? A. An individual suffering from psychoneurosis may very well



procrastinate, and is part of his illness because he is either at that time in a state of anxiety and when in an acute anxiety state he is definitely then moved by this underlying fear and anxiety.

Q. Would he be able to attend to his business at times?

A. He could at times, yes.

Q. Would his sense of values and the relative importance of duties which should be performed and things he had to do be affected by that condition? A. He would always be affected by the underlying morbid fear and anxiety, the condition in which he is involved, and at times it is greater at some moments than at others.

Q. Assume that he had the intellectual capacity to attend to business, would his will power, his will to attend to business or perform his duties be affected by this condition? A. As far as these conditions are concerned, there is no loss, intellectual loss, of the faculties, but there is involved the inability to use the intellectual functions.

Q. Assuming that the man in question had been told that he had a coronary heart condition, what effect would that have?

Mr. Behrens: I object. That is not included in the hypothetical question.

Mr. Cahill: Yes, it was. I think I would like to call attention to it and have it assumed in the question.

The Court: Is it your intention to question the witness as to whether that portion of the testimony would have special effect on the general answer?

Mr. Cahill: Yes.

The Court: Reframe your question.

Q. Assuming that this defendant—

The Court: Not this defendant. Assume that the person described in the hypothetical question.



Q. (Continued) —and within the time referred to; assume that the person described in the hypothetical question had a special serious duty to perform in March, 1937, and that prior to that time he was informed that he might be suffering from a form of coronary heart disease, what effect would that have on the individual? A. It would greatly involve his already excited and morbid fears, fears of death, and in general intensify his symptoms.

Q. Might that have any effect on the performance of this duty that he had at that time or in the performance of any of his duties? A. It would intensify his underlying fear. It could interfere with his will to carry out his opinions, wishes or desires, in many ways.

Mr. Behrens: I think "could" was the question.

The Witness: Well, it might.

The Court: The question was "might" and the answer was "could" as I understand it.

The Witness: Yes, it could.

Q. Will you take into consideration in your answer also this assumption, doctor—I think it might have been an incomplete question—that fears for the support of his children and wife or inability to support his family; assume the support of his family were also in his mind, would that affect the condition?

Mr. Behrens: That is not related to any specific period of time as included in the hypothetical question period, and therefore has no bearing.

The Court: It is related to the specific time. I will permit the answer of the witness as to whether it would have any special result.

Q. I specify the time as the early part of the year 1937.

A. I would say that it could very definitely affect and in-

700 *Dr. Stephen P. Jewett—For Defendant—Direct—Cross.*

tensify the existing symptoms that already were present. If I understand your question, at the time he naturally feared that he would not be able to provide for his family. Wasn't that included as a condition?

Q. Yes, sir. A. I would have answered that it would.

Mr. Cahill: I think that is all.

*Cross-examination by Mr. Behrens.*

Q. Doctor, is your testimony here limited entirely to the hypothetical question which has been propounded to you?

A. Yes, it is.

701 Q. This hypothetical question was that this man is a man of hypothetical reference. If you assume that even today he is still suffering from this same mental trouble to a certain extent would you, as a psychiatrist, be able to examine him today and determine whether or not he ever had this actual neurosis or psychosis back in 1936 and 1937?

A. Yes, I would be able to but I would have—it would be a question of historical development of his symptoms. His history—it would be on the history.

The Court: Your answer would depend on the answers to the questions you propound to the witness?

The Witness: Yes.

702 The Court: As to the questions about the organic condition?

The Witness: It might show a certain disturbance in the physiological functions of the body, such as exaggerated pulse rate, and so forth.

Q. Doctor, this hypothetical question to which you have given an answer indicating an opinion, would you say that your answer would be any different if he had been rejected for life insurance only once or twice instead of seven or

eight times? Would that affect your opinion? A. No, not necessarily.

Q. Your opinion is the same? A. The mere fact that he was rejected once might be enough.

Q. In the absence of this man having received \$40,000 and lost it, would you still be able to give an expression of your opinion based upon the other elements, such as jumping in front of subways and things of that character? Would you still be able to give your opinion? A. I think I do not quite understand your question.

Q. If we rule out of the hypothetical question, doctor, the receipt by this individual of \$40,000, to that extent would your answer still be the same to the hypothetical question? A. Yes.

704

Q. If we rule out of the hypothetical question the information which this man received that he had a coronary disease of some sort on a particular occasion in 1937, would your answer still be the same?

The Court: Just a minute. Do you mean in addition to ruling out the other elements?

Mr. Behrens: That item referred to other diseases in there.

A. I still could give the same opinion.

Q. Is it your opinion, doctor, that this man was suffering from the disease which you have indicated during the years 1932 to 1938 or 1939, or at least through 1937? A. During the periods that I understood to be contained in the hypothetical question was from a period from around 1932 up through 1937 or something like that. That is what I understood. It also was my impression that the activity—that at times it was worse than others; that the symptoms were there and at times were more intensive. That is the impression I got.

705

Q. From this hypothetical question would you be able to say whether he had this disease, whether to one degree or

another throughout the entire period? A. I think he did, from the observations that I made of the hypothetical question, yes.

Q. Would you say that the man described in this hypothetical question was a maniac? A. No, I would not.

Q. Would you say that he understood his surroundings? A. I would say that he did.

Q. Would you say that the man described in the hypothetical question would be likely to sell a book worth \$1,000 for \$1? A. That I could not answer. I do not know whether he would or not. I rather doubt that he would, but I do not know.

The Court: The hypothetical question said that he was engaged in the investment trust business.

Q. Would this man be likely to take securities worth \$10,000 and sell them to some man for \$1, not realizing the value of them? A. I doubt if he would.

Q. The sense of values would not be destroyed to that extent? A. I would not say that the sense of values would not be destroyed, but I do not think he would do that.

Q. Would you tell us again what the disease is which you think, in your opinion, the man was suffering from? A. Yes, sir, I believe he suffered from what we characterize as psychoneurosis, and this is characterized by morbid anxiety, morbid fears and various physiological disturbances which I have described.

Q. Would you say that the condition would be more accurately called neurotic rather than psychotic? A. No. Psychoneurosis is a definite name which we give this disorder, such as I testified about.

Q. If you will excuse me for a minute, I think you testified about some major and minor psychoses? A. I said certain neurosis is a mental disorder or a minor psychosis, which I definitely put in the category of certain neuroses.

Q. Would you say that this man as described in the hypothetical question was insane? A. I would say he was not insane.

Q. The condition which you have described as psychoneurosis, is there any similarity between that and this neurocirculatory asthenia? A. Yes. A cardiologist specializing in cardiac disease examining this individual would find his blood pressure rather high, would find his pulse rate rather rapid and find no evidences in the tests such as the electrocardiograph tests, and so forth, of the organic disease. He might find evidences of neurocirculatory asthenia, which would be a part of the psychoneurosis. That is a different terminology.

Q. Am I correct in stating that this psychoneurosis is a relative term in the sense that it does not result in the same degree of disability, if any, in each case, but the cases will vary? A. It does vary, that is true, and also the same causes are increased at times by anxiety attacks.

Q. Would you be able to tell us to what extent this man in the hypothetical question would be incapacitated from handling his daily affairs, by limiting yourself solely to the hypothetical question put to you? A. It would vary a great deal from time to time. I might state that the individual as mentioned in the hypothetical question might at one moment be able to do something and then there was an inhibition based upon fear, and then at a later time at which he might or might not be able to secure his desire.

Q. May I ask you the question in this way: One man with the disease which you have indicated may be completely prostrated in his bed and be there for months, is that correct? A. There are such times when they are in bed, yes, sir.

Q. Another man might substantially do his ordinary duties? A. At times?

Q. Yes. A. At times.

712 *Dr. Stephen P. Jewett—For Defendant—Cross.*

Q. If we find that this hypothetical man drew checks, attended directors' meetings, embarked upon the program for the national distribution of securities, drew corporate minutes—

The Court: Strike out "drew corporate minutes".

Mr. Cahill: Even as to attendance of directors' meetings.

The Court: There was evidence on that, I think.

Mr. Cahill: One or two; certainly not a regular attendance.

713 The Court: He did not say how many, but there was evidence, I believe, of the attendance at directors' meetings.

Mr. Cahill: I am not certain of that. I think we have somewhere the directors' meetings in evidence.

The Court: The jury will remember.

Mr. Behrens: I believe the testimony which I have in mind is this: there were four directors and it was a question of investment policy—

The Court: You need not explain it. I think there was some evidence, at least, if my recollection serves me, of the attendance at directors' meetings.

714 Q. (Continued) —that he drew checks, took part in the investment policy of the investment trusts and things of that character, would you call that man completely unable to take care of his affairs? Would you, doctor? A. Why, no, I have not so testified. It would vary a great deal. They are variable.

Q. Would you say, if we get the best answer, that he is incapacitated by looking at his activity? A. In view of the possible explanation that existed, I would want to know as many facts as possible in connection with it.

The Court: Let me ask one question.



*By the Court.*

Q. Would you think that at any specified time the hypothetical person described to you, would you think that if he drafted or participated in the drafting of one agreement, would that indicate that he was able to participate in the drafting of another agreement? A. Not necessarily. It would only indicate that at that particular time he was able to do it.

Q. Could he have drawn another agreement in lieu of the one he had drawn? A. Not necessarily.

Q. You mean this ultimate agreement might arouse his fears? A. He might have another set of fears intensified, that is possible.

716

Q. Suppose the two agreements were of a similar character; would you say if he participated in the drawing of one instrument, a so-called legal instrument, would that indicate that he could draw another legal instrument of the same character? A. Not necessarily because something else might circumvent, some other impulse might come up. I could not say.

Q. That is not a condition which affects the time? A. Yes. It does affect the time at the moment. The times are variable. He might have an acute anxiety attack which would affect his behavior for an hour or two and then he might be able to do something.

Q. Suppose at 12 o'clock Monday he preferred to go to the theatre. It is not in evidence. Assume it is a fact, that he went to the theatre at 10 o'clock at night of a certain day and he saw one show, would that indicate to you that he was in the condition to attend the theatre at that time?

717

A. At that time?

Q. At that particular moment? A. Yes.

The Court: Very well.

*By Mr. Behrens..*

Q. What are the characteristics of the man mentioned in the hypothetical question as to pessimism or optimism? A. Well, I would say he was very pessimistic and morbid as to his physical characteristics. I do not know that I could necessarily characterize him as optimistic or pessimistic. There is nothing which is given me as to his previous personal make-up here in that respect.

719

Q. Is the man which you have described largely limited to living in the present rather than in the future because of the great fear of death which is with him? A. I would not answer that yes because there is a certain expediency that governs their actions, certain morbid expectation in things that are going to happen. Since that governs their behavior to a great extent, I could not say he was living in the moment, necessarily.

Q. If this hypothetical man says that he felt each step was his last and each breath was going to be his last, would you say that that man would be likely to be thinking much about what would happen a year or two years from now? A. Well, he might.

Q. In other words, the fear of death would not be so overwhelming that it would incapacitate him in every respect? A. You mean in that particular moment?

Q. Yes. A. At that particular moment he will be completely absorbed with that idea at the moment.

720

Q. He would not be making plans for the future? A. Not at that moment, no.

Q. If you take away from the hypothetical question, doctor, the receipt of that money, or limit yourself in the hypothetical question to everything that happened in 1932 or 1933 or 1934 and 1935, and say, the first couple of months, January and February of 1936, if you limit yourself to that period of time would your answer change? I am now ruling out the \$40,000, the couple of rejections by life insurance companies and also rule out—

*Dr. Stephen P. Jewett—For Defendant—Cross.*  
*George W. Hermance—For Defendant—Direct.*

721

The Court: The foreclosure on his house, that proceeding.

Q. (Continued) The foreclosure of his house, and the rejection during which he was advised that he had some coronary trouble, put those to one side and leave everything else there, would your opinion change? A. In a certain measure it would change, yes, to this extent, which I have already testified to, various factors would intensify his symptoms.

Q. Would it change your answer as to whether or not he was suffering from this disease? A. If he were at that time, if he had fears of riding in subways, fears of going into restaurants, had fears that he was going to die, I would still say he was suffering from a psychoneurotic illness.

722

Mr. Behrens: Thank you.

Mr. Cahill: That is all, doctor.

The Court: Do you want to put Mr. Spies back?

Mr. Cahill: I have a man who has a day off. His testimony will be brief.

The Court: I do not suppose the Government has any objection?

Mr. Behrens: No, that is all right, your Honor.

GEORGE W. HERMANCÉ, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

723

*Direct examination by Mr. Cahill.*

Q. Mr. Hermance, with what company are you connected?

A. New York Life.

Q. In response to a subpoena have you brought some records of the New York Life Insurance Company with you? A. I have.

Q. Do they relate to the application of Murray R. Spies for insurance? A. They do.

Q. At what time? A. There is one application here of 1932. Do you want the date?

Q. Yes, if you please. A. May 16, 1932. Here is another application of April 25, 1933. Here is another application of January 8, 1937.

Q. You say you have two applications for two policies? A. No, three applications, for three policies.

Q. In 1932, 1933 and when? A. 1937.

Q. Have you got the 1937 application there? A. I have.

Q. Will you let me see it for the moment? A. You are talking about the application now?

Q. Yes. A. (Witness hands counsel.)

Q. I asked whether you had an application. Do you have the file relating not only to the application but to the action taken on that application? A. I have.

Q. Do your records show whether the policy was issued? A. In 1937 we declined Mr. Spies.

Q. What date was that? A. The declination was in February, February 3, 1937.

Q. Had he been declined on the other two occasions? A. No. In 1932 we issued a policy, but in 1933 we declined.

Q. Is the 1932 policy still in force? A. No, it was never taken.

Q. Do your records indicate the reason for the declination in 1937?

Mr. Behrens: I would like to have the records speak for themselves.

The Court: Unless this witness has some personal recollection of it.

Q. On that one declination do you have the original records? A. Yes.

Q. There were some photostats furnished on the prior case? A. Yes, in April, 1941.

Q. Do you know whether they were given to me or to the government? I would like to trace them in order to give you your original records. A. I think they were furnished to the government.

Mr. Cahill: I do not have any recollection of having them.

Mr. Behrens: I think the photostats are actually in evidence.

Mr. Cahill: Of the three?

Mr. Behrens: Was the 1932 policy rated?

A. It was.

Q. Rated up how many years, do you know? A. Nine years. 728

Q. Did your company have any correspondence with a physician by the name of Dr. Howard Gilman? A. Gilman?

Q. Yes. A. I am under the impression that our papers show that. Yes, there is a carbon copy here of the letter written to Dr. Howard Gilman.

Q. May I see that letter, if you please? A. (Witness hands counsel.)

Q. Have you another copy of this? A. No, I have not.

The Court: Read it into the record.

Mr. Cahill: May I read this into the record?

Mr. Behrens: Yes, I have no objection to that. 729

Mr. Cahill: Without objection of the government I will read the letter in evidence. It is dated March 12, 1937, and addressed to Dr. Howard Gilman, 1791 Grand Concourse, Bronx, New York.

"Dear Doctor:

"Mr. Murray R. Spies has asked me to let you know the result of his recent examination:

730 *George W. Hermance—For Defendant—Direct—Cross.*

"Pulse, 110, regular; systolic blood pressure was 156, diastolic 97; mitral regurgitant murmur, electrocardiograph abnormalities sustain a probable coronary disease, although the deviations from the normal are not exactly of a definitely diagnostic nature. X-ray negative.

"I trust this information will be of service to you.

"Very truly yours,

Medical Director."

Q. That came from your files, did it? A. It did.

731 Q. That is a copy of a letter sent out by your medical director? A. It is a copy of the letter which was sent out by our medical director.

Mr. Cahill: That is all.

*Cross-examination by Mr. Behrens.*

Q. May I see the last file, please? A. (Witness hands counsel.)

Q. I show you this file which you just handed to me and I ask you whether it shows a letter signed Murray R. Spies, dated March 8, 1937? A. It does.

Mr. Behrens: I wonder if we could have that read into the record?

732 Mr. Cahill: No objection.

Mr. Behrens: This is on the letterhead of Murray R. Spies, Attorney at Law, 40 Exchange Place, New York, dated March 8, 1937:

"New York Life Insurance Co.,  
51 Madison Avenue, New York, N. Y.

"Dear Sirs:

"Will you kindly forward to my physician, Dr. Howard Gilman, 1791 Grand Concourse, New York, an



abstract of the record in connection with my applications for insurance with your company? Dr. Gilman needs these records in order to be in a better position to check up on me.

"Very truly yours."

It purports to be signed by Murray R. Spies, and down in the bottom are the initials "MRS—EM."

The Court: May I look at that?

Mr. Behrens: Yes, your Honor (handing to the Court).

Q. I ask you whether there is also in your file a letter dated March 17, 1937, from Murray R. Spies? A. There is. 734

Mr. Behrens: I would like your Honor's permission to read that into the record.

The Court: All right.

Mr. Cahill: No objection.

Mr. Behrens: This letter is on the letterhead of Murray R. Spies, Attorney at Law, 40 Exchange Place, New York. It is dated March 18, 1937.

"New York Life Insurance Company,  
51 Madison Avenue, New York, N. Y."

"Dear Sirs:

"I enclose herewith a copy of my letter to you dated March 8, 1937. 735

"Dr. Gilman advises me that this report has not been received by him. I will appreciate anything you can do to expedite the matter.

"Very truly yours."

It purports to be signed by Murray R. Spies. It bears the initials on the bottom, in the corner, "MRS—EM" and under that "Enc."

736

*George W. Hermance—For Defendant—Cross.*

Would your Honor like to see this?

The Court: No.

Q. You have produced here, sir, in your file an original application to the New York Life Insurance Company or at least, the No. 2 answers to the medical examiner? A. That is correct.

Q. I would like you to be sure of that. A. That is correct. That is the answer to the medical examiner.

Q. I would like to show you Government's Exhibit 63 and ask you whether No. 2 here is a photostatic copy of the original which you have in your records? A. It is.

737

Mr. Cahill: What number is it?

Mr. Behrens: It is No. 63, Mr. Cahill.

Q. Would you compare Government's Exhibit 58 with that original file so far as the application of May 16, 1932, is concerned and tell us if that exhibit is a photostatic copy? A. You are talking about the application or the answer to the examiner?

Q. The answer to the examiner. A. It is an exact photostatic copy.

Q. Will you do the same thing as to Government's Exhibit 60? A. That is of 1937?

Q. That is April, 1933? A. 1932?

Q. April, 1933, I think. A. You are right; my error.

738 This is an exact copy.

Mr. Behrens: Thank you. I have no other questions.

Mr. Cahill: That is all.

The Court: Recess to 2.15.

(Recess until 2.15 P. M.)

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(AFTERNOON SESSION—2.15 P. M.)

The Court: It has come to my attention that one of the jurors would like to question one of the witnesses. In some cases there may be circumstances under which that will be permissible. I have considered the matter. I have decided that in this case it would be best that the practice should not be permitted. I will therefore ask the jury to content themselves with the facts as elicited by counsel only and when the time comes that they are to act on the evidence that is in the record. The reasons for my decision are very largely to carry out the rules as to the admissibility of evidence in this particular case, and the asking of a question which may not be admissible in itself has an effect which I should like to avoid. For that reason I would prefer that the jury would refrain from asking the witnesses any questions. 740

You may proceed. Are you going to recall Mr. Spies?

Mr. Behrens: Mr. Cahill has indicated that he has some other witness.

The Court: You have another witness that you want to call out of order?

Mr. Cahill: A very brief one, a life insurance man.

Mr. Behrens: I have no objection.

The Court: Very well. 741

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LEIF H. OLSEN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

*Direct examination by Mr. Cahill.*

Q. With what company are you connected? A. With the Mutual Life Insurance Company of New York.

742

*Leif H. Olsen—For Defendant—Direct.*

Q. Do you have a file relating to the application of Murray R. Spies for life insurance? A. Yes, I have.

Q. Have you produced it in response to a subpoena? A. Yes, sir.

Q. May I ask the date when the insurance was applied for? A. (Witness hands to counsel.)

Q. Possibly you can read it better than I can. Give us the date? A. There are two tentative dates. There is really no application. There are two requests to the Mutual Life Insurance Company to consider the person for insurance.

Q. That is what it was? A. Yes.

743

Q. There was no formal application? A. No, there was no formal application.

Q. There was a request to consider the man? A. Yes.

Q. A request by him? A. No, sir.

Q. Who made the request? A. It has never been definitely established. This request came over the teletype from our New York City agency, to the home office. It is handled as a clerical matter. There is no way of knowing just who requested it at all.

Q. At any rate there was a request anyway for insurance on his life?

Mr. Behrens: I object to this as pure hearsay.

The Court: I will have to sustain that.

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Mr. Cahill: I think I may have to put Mr. Spies on the stand to prove that one fact, that he did so apply.

The Court: All right.

Mr. Cahill: Will you step down for a moment? (Witness temporarily excused.)

*Murray R. Spies—Defendant—Direct—Cross.  
Leif H. Olsen—For Defendant—Direct.*

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MURRAY R. SPIES resumed the stand.

*Direct examination by Mr. Cahill.*

Q. Mr. Spies, did you apply to the Mutual Life Insurance Company of New York through a broker for insurance? A. As I recall it, Mr. Cahill, an agent who had heard of the rejections told me that he could get me insurance through the Mutual.

Q. Who was it? A. I have forgotten his name. I think it was Mr. Leader. I cannot definitely recall the name.

Q. Did you ask him to get the insurance for you? A. Yes, I asked him to see if he could accomplish insurance through the Mutual.

746

Q. In what year was it; do you know? A. Yes, I believe it was in 1938, the application.

Mr. Cahill: I guess that is all.

*Cross-examination by Mr. Behrens.*

Q. Did you ever appear for examination by a doctor of that company? A. I do not remember, Mr. Behrens.

Mr. Cahill: I think maybe the records will show that.

747

LEIF H. OLSEN resumed the stand.

*Direct examination (continued) by Mr. Cahill.*

Q. When was this request for a consideration of Mr. Spies for insurance by your company made? A. There was one made on March 1, 1933.

Q. The next one? A. Another request on November 5, 1937.

Q. Was a policy issued? A. No, sir.

Q. Did your company decline to consider him for insurance? A. Declined to consider him.

Q. On what ground? A. On what we call confidential information.

Q. Based on the actions of other companies, was it?

Mr. Behrens: I object to it.

Mr. Cahill: Withdrawn.

Q. On what was it based?

The Court: I have to sustain the objection.

Mr. Cahill: To the last question?

The Court: If a motion were made to strike out his answer as to confidential information, I would have to strike it out.

Mr. Behrens: I so move.

The Court: The motion is made. We cannot have before the jury confidential information, I think you will agree with me. I think you can prove by this witness that the company had a request for insurance and that the company did not issue the policy.

Mr. Cahill: I have done that. I thought that the reasons were communicated to the defendant and then I could bring them out.

The Court: You may ask him whether they communicated it to the defendant.

Q. Did you communicate to the defendant or to his broker? A. On November 10, 1937, we advised the manager who had requested the consideration that we would prefer not to consider Mr. Murray R. Spies for insurance.

Q. Was that all that you told him? A. Yes.

Mr. Cahill: I think that is the end of that.



*Cross-examination by Mr. Behrens.*

Q. I would like to see the file, if I may? A. (Witness hands to counsel.)

Q. Do you have another file? A. That is all the files we have on that particular case. Here are some of my papers from the home office which were used in acting on applications.

Q. Do you see any application, formal or otherwise, in these papers? A. There was no application at all, just a request from the agency which was sent over the teletype, asking that we consider Mr. Spies for insurance. You will find that on the very back.

Q. So far as you know there was no formal application? A. No, there has never been a formal application. 752

Q. You did not receive any information from your agent or from Mr. Spies with respect to anything outside of his age then, I assume? A. No, just what we have there in the file.

Mr. Behrens: I have no further questions.

*Redirect-examination by Mr. Cahill.*

Q. Mr. Olsen, let me ask you this question: Do the various insurance companies give information to each other in connection with policies?

Mr. Behrens: I object to that as immaterial. 753

Mr. Cahill: My reason is not connected with the bringing out of the request. I will state it briefly, if you wish.

The Court: I will let him answer the question, but whether I will let him answer subsequent questions is another matter, whether there is a practice of obtaining information.

Mr. Cahill: Yes.

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*Leif H. Olsen—For Defendant—Redirect.  
Murray R. Spies—Defendant—Cross.*

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The Court: If he knows.

The Witness: There is.

Q. There is a practice of getting information with respect to applications for life insurance? A. Yes.

Mr. Cahill: That is all.

Mr. Behrens: I have no further questions.  
(Witness excused.)

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755

MURRAY R. SPIES resumed the stand.

*Cross-examination (resumed) by Mr. Behrens.*

Q. Mr. Spies, I show you a photostatic copy of what purports to be an operator's renewal application dated September 28, 1937, and ask you whether you recognize that?

A. Yes.

Q. Is that your signature? A. Yes.

Q. Did you write in yourself the answers to these questions? A. I did.

Mr. Behrens: I offer it in evidence.

The Court: Show it to your adversary.

Mr. Behrens: Yes (handing to Mr. Cahill).

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Mr. Cahill: I object to it on the ground that it is irrelevant.

The Court: What is the date?

Mr. Behrens: September 28, 1937.

Mr. Cahill: Doesn't it expire in 1940? I see it is three years. I have on myself.

The Court: It is a driver's license application?

Mr. Behrens: Yes.

Mr. Cahill: I have one myself. I do not see anything in there that is relevant, but I do not object.

The Court: Now, Mr. Cahill; do you want to make an objection to it?

Mr. Cahill: I object as to the relevancy.

The Court: I overrule the objection.

Mr. Cahill: Exception.

(Marked Government's Exhibit 69.)

Mr. Behrens: I would like to read to the jury one question and answer to Government's Exhibit 69 in evidence.

The Court: And your adversary may read any other question.

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Mr. Behrens: Question 13 ending: "With the safe operation of a motor vehicle have you been confined to a State institution, State hospital or private institution since April 15, 1936?" And the answer is "No."

Q. On your direct examination, Mr. Spies, you referred to some telephone conversation which you had in the fall of 1937 with a young lady connected with the internal revenue office? A. Yes.

Q. Can you fix the approximate date of that? A. I would say somewhere between September and November of 1937.

Q. Do you recall about what hour of the day you called the Collector of Internal Revenue? A. No, I do not, Mr. Behrens.

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Q. Would you tell us to which office of the Collector of Internal Revenue did you make this call, Mr. Spies? A. At the Customs House.

Q. The one down here at the Battery in New York City? A. Yes, sir.

Q. Would you give us the name of the person with whom you spoke? A. No, I could not do that, Mr. Behrens. It was a young lady. That I am sure of.

Q. You did not get her name? A. I may have at the time but I do not recall having done it.

Q. When you called the Customs House and were connected, for whom did you ask? A. I asked for somebody in the office of the Collector of Internal Revenue. I said I was to speak to somebody in connection with my income tax return.

Q. Then the girl switched you on to somebody else? A. Yes.

Q. You say that she was a young lady? A. It was.

Q. Will you tell us what you said to her and what she said to you? A. I told her that I was calling in connection with my 1936 return and that I was working on a matter which gave promise of some capital, and that when it was consummated I would then make out and file my return and pay my tax. She said—I asked her to get the file out before I completed my conversation, and she said that she would get the file. She said she got it, and I asked her to please note it on the file. She said she would. That is the end of the conversation.

Q. Note what on the file? A. What I just told you.

Q. She told you that she did? A. Yes.

Q. During any time did the girl tell you you would not have to prepare, file and pay a tax if you obtained an extension? A. No, I just asked her to make a note on the file.

Q. She told you she had the file out and was going to make the note? A. Yes. As a matter of fact, there was a delay while she got the file.

Q. You referred, I believe, to some visit to the United Sponsors of an agent of the Bureau of Internal Revenue. Will you tell us when that visit was? A. I think it was the end of 1936 or the early part of 1937.

Q. Where was the office of the United Sponsors at the time? A. 40 Exchange Place.

Q. Where was your office at the time? A. The sixth floor below, 40 Exchange Place.

Q. What was the name of the agent who went with you to the office of United Sponsors? A. I have no recollection whatever, Mr. Behrens.

Q. What was the purpose of your going there with him? A. That I do not recall, except that he came to my office and asked me to go upstairs with him.

Q. Yes? A. I think it was to check my income on United Sponsors, and I went up with him. I do not believe we stayed there over ten minutes.

Q. This was your income from United Sponsors only? A. It must have been, for 1936.

Q. You mean the income you had actually received in 1936 was then being audited by an internal revenue agent before 1936 was even over? A. Mr. Behrens, as you know, there was a matter under consideration by the Government in connection with United Sponsors at the time. 764

Q. What did that have to do with your income tax return? A. I had no idea at the time. He came to me and asked me to go with him. I still did not understand why.

Q. The latter part of 1935 is it your recollection that an agent came to you to audit your 1935 income tax return? A. No, I said at the end of 1936. You said 1935.

Q. I am sorry. At the end of 1936? A. It was either the end of 1936 or the early part of 1937. But he did not say why he came to audit my income. My recollection was that he asked me to go upstairs in connection with my income from United Sponsors.

Q. Didn't he have the original of your income tax return for the year 1935 with him at that time? A. He was not checking 1935, Mr. Behrens. This was income for 1936. Whether his inquiry was in connection with whether or not United Sponsors' report was proper or not, I do not know. I really do not know, have a definite recollection as to the specific purpose of the man's visit. 765

Q. I would like to leave that for just a moment and get down to something else. I think I have papers available

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*Murray R. Spies—Defendant—Cross.*

that will refresh your recollection. Do you recall about August of 1937 you signed a contract to purchase a lot out in Rockville Center? A. May I look at—I know there were negotiations of some kind at that time.

Q. Yes (handing to witness). A. Yes, sir.

Q. Do you identify this photostat copy as a photostatic copy of the agreement you had? A. I would say so. My signature is at the bottom.

Mr. Behrens: I offer it in evidence (handing to Mr. Cahill).

Mr. Cahill: I object to it as irrelevant.

The Court: Overruled.

Mr. Cahill: Exception.

(Marked Government's Exhibit 70.)

Q. Is this your recollection, Mr. Spies, that the purchase price of that house was \$16,000, of which you were going to pay \$4,000 in cash and get a mortgage for the other \$12,000?

A. Yes, sir.

Q. In connection with the obtaining of the mortgage it was necessary for you to file an application, is that correct? A. That is right.

Q. I would like to show you a photostatic copy of what purports to be an application for a loan dated August 30, 1937, to the County Federal Savings and Loan Association of Rockville Center, and I ask you whether you can identify that document? A. Yes, sir, I identify my signature on it.

Q. Do you find your signature on the other side, too? A. Yes, sir.

Mr. Behrens: I offer it in evidence.

Mr. Cahill: I object to that also as irrelevant.

The Court: Not on the ground that it is a photostat!

Mr. Cahill: No.

The Court: Overruled.

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Mr. Cahill: Exception.

(Marked Government's Exhibit 71.)

Q. With reference to Government's Exhibit 71, I call your attention to the second page marked "Information requested below must be supplied," and I ask you whose handwriting it is appearing in the center part? A. That is not mine. I would say it was the broker's, or the real estate broker.

Q. A man named Schley, S-c-h-l-e-y? A. I think so.

Q. Where did he get the information that he put on there? A. He got it from me and Mrs. Spies.

Q. There is another matter that I would like to call your attention to? A. May I just take another look at that, Mr. Behrens, please? 770

Q. Yes (handing to witness). A. I think I answered before really looking it over. In answer to that question, Mr. Behrens, I know of course—I want to say that some of these answers were put down after disclosing this to the broker and being advised by him as to what the answer should be. In each case, however, I believed that it was a reasonable analysis of the facts as given to him.

Q. You are not suggesting that any of the statements made there are false? A. Not false, Mr. Behrens, but this figure of \$250 a week salary was arrived at on the basis of my previous earnings, put down.

Q. Your previous earnings during what period of time? A. We probably took an average of two or three years. 771

Q. Did you make any money during the year 1937 in the way of salary? A. No, sir, I think it was based primarily on 1936 and 1935, and back then. I explained the facts of the income to the agent and we decided these figures should go in.

Q. Where did the figure of \$40,000 as being your net worth at that time come from? A. That was arrived at on the same basis, disclosing the facts to the agent and he

decided—we decided, that under the circumstances it would be a fair figure.

Q. What would the real estate agent know about what your net worth was? A. As I say, I disclosed to him my position.

Q. What did you disclose to him in the way of your position at that time? A. Whatever it was, Mr. Behrens, nothing different. This was the agent who was responsible for the sale of the house; of course.

Q. O course. But where did the \$40,000 come from—the agent? A. No, that is what I figured my net worth was at that time, including potentialities on the program and what not.

Q. On June 11, 1936, did you pay Mr. Lucian A. Eddy or his representative the sum of \$2,000? A. Yes, sir, I did.

Q. Why did you make that payment? A. Mr. Eddy was president of the company from which I resigned, and I received a substantial amount of cash, or was to receive a substantial amount of cash, and he was to continue with the company for a period of five years, and he was, as I understood and believed, pretty well pressed at that time, and he asked me if I would loan him or advance or give him \$2,000, and I said yes, on the condition if he got a cash bonus or got a consideration out of the sale or resignation or exchange he would repay it. I took a note for that indebtedness. It was really on the basis of my getting \$40,000, and he needed two, and I gave it to him on that basis.

Q. You loaned it to him? A. The basis of the loan is as I just described.

Q. I would like you to tell me, please, whether Government's Exhibit 16 in evidence is in your handwriting? A. Yes, sir.

Q. Some few minutes ago we were discussing the visit you made to United Sponsors with the internal revenue agent, and I wonder if the name of William R. Rorer, R-o-r-e-r, recalls anything to your mind in that regard? A. No, it does not, Mr. Behrens.

Q. I would like to show you a certain document which is dated December 4, 1936, and I ask you whether that is your signature? A. It is.

Q. Does it refresh your recollection at all as to the visit you had been making in connection with the United Sponsors? A. No, sir, it does not.

Q. Do you recall signing the agreement? Well, I do not definitely, but, of course I signed it, Mr. Behrens. That is my signature.

Mr. Behrens: I would like to offer it in evidence.

Mr. Cahill: I submit that on the face of the document it is not relevant.

The Court: I have no idea what the paper is that you are talking about. It has not been identified.

Mr. Cahill: I will show it to you. It has been offered in evidence (handing to the Court).

The Court: Mr. Behrens, on what issue do you think this is admissible?

Mr. Behrens: I think it is admissible on the question of his visit to the United Sponsors in 1936. This witness has contended that they were then trying to find out what money he got in 1936. I think this clearly shows what the visit was made for.

Mr. Cahill: I think it is purely a collateral matter. It does not relate to all, primarily, to the issue. I do not think this was identified.

Mr. Behrens: I will offer it on the theory that it shows his activities in 1936 at a time when he was incompetent.

Mr. Cahill: I do not make any claim that he was incompetent.

The Court: I will admit it on the showing of his capacity or lack of capacity in December, 1936, which is a date sufficiently approximating the time in issue here as relevant.

Mr. Cahill: I do not want to argue it. It has never been claimed that he was incompetent to do the ordinary things of life. That is not claimed.

The Court: I understand so, but nevertheless all of these items are facts which the jury may weigh and draw certain inferences from. I think it is relevant on that issue. I overrule the objection.

Mr. Cahill: I object to it as irrelevant and incompetent, and take an exception.

The Court: I will allow it for that limited purpose.

(Marked Government's Exhibit 72.)

779 Q. We were discussing this morning, Mr. Spies, this question of National Fund and your becoming interested in it. I believe you told us that you first spoke with Mr. Davis before February 18, 1937, is that correct? A. I said I recalled it was either in January or February of 1937.

Q. After that conversation with him, before or after, you drew a check on February 18, 1937, to the order of the bank in the sum of \$1,907.50. A. Yes, sir, definitely.

Q. At or about that time did you make an agreement with Mr. Davis whereby he was to become a director of First Mutual Corporation? A. I did in the months of February or March, I believe, 1937.

780 Q. Do you recall how long he was to remain as a director on a drawing account? A. I do not think the agreement was for him to remain a director. I think the agreement was for him to take over the job of sales distribution and advertising of the investment fund. I think that was to run for a period of six months.

Q. Before you went into this National Fund Corporation, did you check its securities in the portfolio and its cash position? A. Do we have a statement of what it was supposed to have?

Q. Yes. A. Yes, we did.

Q. Did you look over the prospectus of National Fund before you went in there?

Mr. Cahill: I think we are going far afield and that you are going into matters that do not relate to these issues at all.

The Court: The question is whether this witness examined the prospectus of a certain company in the spring of 1937?

Mr. Behrens: Yes.

The Court: I will receive it and overrule your objection.

Mr. Cahill: I take an exception.

A. I did look it over, yes.

Q. Would you identify this as a copy of the prospectus which you looked over (handing witness)? A. Yes, sir.

Mr. Behrens: I offer it in evidence.

Mr. Cahill: I will object to it.

The Court: It is admitted in evidence, its contents, simply as a document which this defendant examined, on the question of his capacity to do so.

Mr. Cahill: I take an exception.

(Marked Government's Exhibit 73.)

Mr. Cahill: What is the name of the company?

The Clerk: National Fund, Incorporated.

Q. Did you check the number of shares of stock of National Fund outstanding before you invested any money in it? A. I do not have any definite recollection, but I would think that I knew the number of shares outstanding, approximately, Mr. Behrens.

Q. When you first became interested in this corporation who was acting as custodian for its securities?

Mr. Cahill: Just a moment. I object to that.

The Court: I assume this is a question that will lead to something else?

Mr. Behrens: Yes, simply a preliminary question.

The Court: Over. led:

Mr. Cahill: Exception.

A. I believe it was the First National Bank or Trust Company of New Jersey, in Jersey City.

Q. Would you say that shortly after you became associated with this corporation the custodian advised you that he wished to resign?

The Court: What is the question?

Mr. Behrens: Shortly after he became associated with this corporation did the custodian advise him that the custodian wished to resign. I want to show what happened in connection with the transfer there and as to the custodian. That is all.

The Court: The witness participated in that activity?

Mr. Behrens: Yes, he wrote letters.

The Court: I will receive it for that limited purpose.

Mr. Cahill: It is not for the purpose of conveying any intention but solely on the basis——

The Court: It is solely for the purpose of showing that this defendant engaged in certain activities of the character specified.

Mr. Cahill: Your Honor understands the point. If there was any suggestions that there was anything wrong about these transactions, I would be glad to open up all of those transactions, but to try several cases before we——

The Court: I will right now say to the jury that we are not trying any other cases but this one. We are not interested in any other matter but this one. This



evidence is being received solely, not on the question of the contents of the activity, but on the question that this defendant was generally engaged in activities, and on the issue of his capacity to engage in such activities.

Mr. Cahill: I take an exception to the ruling.

Q. Mr. Spies, I show you what purports to be a copy of a letter dated March 4, 1937, sent by the First National Bank of Jersey City to National Fund, and I ask you whether you ever saw the original of that letter? A. I believe so, Mr. Behrens.

Q. It was in this letter that National Fund was advised that the custodian wished to resign as at a given date? A. Yes.

788

Mr. Behrens: I will offer that letter in evidence.

Mr. Cahill: Objected to as irrelevant.

The Court: I will exclude it. I sustain the objection. I thought you were getting to the point where this defendant did some activities.

Mr. Behrens: Yes, your Honor. That is my next question.

The Court: You will have to produce it first and come back to it.

Mr. Behrens: I shall.

Q. I show you what purports to be an original letter on the letterhead of the National Fund, Inc., March 8, 1937, and which purports to bear your signature. Can you identify that? A. I do.

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Q. Will you read us the first line of that letter? A. "We acknowledge receipt"—addressed to the First National Bank by me, National Fund was me—

Mr. Cahill: I would like the same objection to that, that it does not relate to the issues before me.

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*Murray R. Spies—Defendant—Cross.*

The Court: I overrule the objection.

Mr. Cahill: Exception.

A. (Continued) —“We acknowledge receipt of your registered letter of March 4, 1937.”

Mr. Behrens: That is sufficient. Thank you.

I renew my offer of the prior offered letter of March 4, 1937, and also offer this original letter of March 8, 1937, which bears the defendant's signature.

Mr. Cahill: I make the same objection.

The Court: Overruled.

Mr. Cahill: Exception.

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The Court: Both exhibits are admitted.

(Marked Government's Exhibits 74 and 75.)

Q. Mr. Spies, I show you a photostatic copy of what purports to be a letter signed by you, to the First National Bank of Jersey City, dated February 18, 1937, and which encloses a certified copy of the resolutions of National Fund. A. That is my signature on both documents.

Q. Your signature appears on the letter and the certified copy of the resolutions? A. Yes, sir.

Mr. Cahill: I make the same objection.

The Court: Overruled; received for the limited purpose that I have already indicated.

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(Marked Government's Exhibit 76.)

Mr. Cahill: What is the date of that?

Mr. Behrens: February 18.

Q. In connection with the resignation as trustee, do you recall receiving the original of this letter dated March 12, 1937, which I now show you? A. I believe I have seen this, the original of this I mean.

Q. You considered the original of that in connection with the termination of the trust agreement? A. I think so.

Mr. Behrens: I would like to offer it in evidence.

Mr. Cahill: To whom is it addressed?

Mr. Behrens: Addressed to the National Fund, by

M. R. Spies.

Mr. Cahill: By whom?

Mr. Behrens: First National Bank of Jersey City.

Mr. Cahill: I object to that.

The Court: Did the witness say that he took action on this letter?

The Witness: I do not believe any action was required on it.

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The Court: You took the letter under consideration?

The Witness: Yes, I think I saw the original of that.

The Court: Did you take that letter into consideration when you wrote the other letters?

The Witness: I would say so.

The Court: I overrule your objection.

Mr. Cahill: Exception.

(Marked Government's Exhibit 77.)

Q. I show you a letter dated March 20, 1937, addressed to the First National Bank of Jersey City by a man whose name I cannot pronounce, F-r-e-u-n-d. I ask you if your signature appears on that letter? A. Yes.

795

Q. Would you say that on or about that date you affixed your signature to that letter? A. I do not know the date, but that is my signature. There is no date stating positively my approval of this thing.

Q. Would you say that it would be at least March 20th or later? A. Yes, it would not be before that, either March 20th or later, Mr. Behrens.

Mr. Behrens: I offer this in evidence.

Mr. Cahill: Same objection.

The Court: Same ruling.

Mr. Cahill: Exception.

(Marked Government's Exhibit 78.)

Q. I show you what purports to be an original letter dated March 22nd, 1937, purporting to bear your signature, addressed to the First National Bank of Jersey City, and ask you whether you sent that letter to the bank? A. I believe so, Mr. Behrens.

Q. You have no doubt that that is your signature? A. 797 None at all.

Mr. Behrens: I offer it in evidence.

Mr. Cahill: Same objection.

The Court: Overruled.

Mr. Behrens: March 22, 1937.

The Court: Overruled.

(Marked Government's Exhibit 79.)

Q. With reference to Government's Exhibit 79, I notice on the second paragraph it says, "As explained to you over the telephone, due to the tremendous amount of work at the office by Mr. Davis and myself, including everyone at the office, we are unable to check up the securities belonging to National Fund."

798 Would you say that in addition to writing this letter of March 22nd, 1937, you also had a telephone conversation with the trust officer at the bank? A. I would say so, yes, sir.

Q. I show you what purports to be an original letter dated March 24, 1937, addressed to the bank, which purports to be signed by you. Is that your signature? A. It is.

Q. That is authorizing the accountant to get information concerning National Fund from the bank? A. Yes, sir.

Mr. Behrens: I offer it in evidence.

Mr. Cahill: What date, please?

Mr. Behrens: March 24, 1937.

Mr. Cahill: Addressed to whom?

Mr. Behrens: First National Bank of Jersey City.

Mr. Cahill: Same objection.

The Court: Same ruling.

Mr. Cahill: Exception.

(Marked Government's Exhibit 80.)

Q. I show you a letter of April 3, 1937, addressed to the First National Bank of Jersey City, purporting to bear your signature. Can you identify your signature on that? 800

A. I do.

Q. And the letter refers to the transfer of some shares of stock in behalf of National Fund? A. That is right.

Mr. Behrens: I offer it in evidence.

Mr. Cahill: Let me see it.

Mr. Behrens: Yes (handing to Mr. Cahill).

Mr. Cahill: I make the same objection to that.

The Court: The same ruling.

Mr. Cahill: Exception.

(Marked Government's Exhibit 81.)

The Court: I am admitting this for the limited purpose. If they do contain admissions which would make them admissible on a more general basis, I wish 801 you would call my attention to it.

Mr. Behrens: I will complete it and go back over and see whether there is anything on it.

The Court: So far it is admitted for the limited purpose I have already indicated, as to which the jury has been informed.

Q. I show you a letter dated April 7, 1937, to the First National Bank of Jersey City. The letter purports to bear

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*Murray R. Spies—Defendant—Cross.*

your signature. Do you recognize your signature on it?

A. I do.

Q. In connection with this letter was it necessary to make arrangements to have a successor custodian to take care of the securities? A: Yes, sir.

Q. And this letter was written by you so that the custodian could get the securities from the old custodian and take them to the bank? A. That is right.

Mr. Behrens: I offer this letter generally, your Honor. I think it goes to the part of the writer of the letter. I think it goes to the question of capacity.

803

Mr. Cahill:—I object to any offer of this on such broad general grounds. Clearly it has no relation to the issues in this case.

The Court: I will receive it for the same limited purpose.

Mr. Cahill: Exception.

(Marked Government's Exhibit 82.)

Q. After you wrote this letter on April 7, 1937, rerequesting the transfer of 300 shares of stock, do you recall receiving an answer from the bank with reference to the transfer of those securities, 300 shares of Pate Pec Oil stock (handing to witness)? A. I do not recall receiving this, Mr. Behrens, specifically, but I would not deny that I did see it.

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Q. Did you have to take some steps in connection with the transfer of these 300 shares of stock in view of the bank's refusal to abide by your instructions?

The Court: Ask him "Did you take any steps" rather than "Did you have to take any steps."

Q. Yes. Would you consider that as the question? A. Yes. I have no definite recollection on it, Mr. Behrens.



Q. Very well. I show you a letter of April 16, 1937, on the letterhead of Murray R. Spies, addressed to Mr. Cherry, of the First National Bank of Jersey City, and ask you whether you recall writing that letter? A. I would say yes to that.

Mr. Behrens: I will offer it in evidence.

The Court: What is the date of it again?

Mr. Behrens: This letter is dated April 16, 1937, to the First National Bank of Jersey City, signed by Mr. Spies (handing to Mr. Cahill).

The Witness: May I see that letter again of Pate Pec? Is that Pate Pec the one I could not remember? I am getting a hazy recollection of something on that ground.

806

Q. Yes (handing witness). A. I think I do recall this, Mr. Behrens.

Mr. Behrens: I will also offer it in evidence.

The Court: Let us have one at a time.

Mr. Behrens: Yes, your Honor.

Mr. Cahill: I make the same objection to this one of April 16. I point out that there is an accumulation of these things.

The Court: Mr. Behrens, bear that in mind. But we have heretofore been dealing with a very crucial period in issue, right at the time mentioned in 1937. Maybe you had better tell us so we will know what exhibit you are talking about.

807

Mr. Cahill. Exhibit 83.

(Marked Government's Exhibit 83.)

Mr. Behrens: I offer a carbon copy of the letter of April 5, 1937, from First National Bank of Jersey City to National Fund, Attention Murray R. Spies, which the witness recalls.

Mr. Cahill: I object to it.

The Court: Sustained. It will take more than recalling the receipt of a letter to make the letter admissible.

Mr. Behrens: I think the mere reading of the letter on or about this date would be just as admissible as any affirmative steps he might have taken.

The Court: No, I will sustain the objection, if it does not show any activity on his part.

809 Q. After the bank refused to deliver the 300 shares of oil stock to which we have referred, did you do anything in order to accomplish the delivery of the stock, Mr. Spies?

A. I imagine we did, Mr. Behrens.

Q. Can you tell us what you did do? A. I would say that probably we gave the bank what it asked for.

Q. You say "probably." Do you mean by that that that is your best recollection? A. Yes.

Mr. Behrens: I renew my offer.

The Court: Did you participate in these instructions or activities?

The Witness: I would rather say yes than no, because there is a possibility that I did.

The Court: Give us your best recollection. Is that your best recollection? I will receive the letter in evidence.

810 Mr. Cahill: In view of the indefinite statement?

The Court: If you make an objection to the answer on the ground it is not admissible, I will sustain the objection.

Mr. Cahill: I object to the statement of fact, the mere fact that the letter came to him and "we took some action; possibly I participated." That does not make it relevant.

Mr. Behrens: I withdraw my offer, your Honor.

The Court: Very well.

Q. I show you what purports to be a copy of a letter written to you by the First National Bank & Trust Company on April 19, 1936, which purports to be an answer to the previous letter which you wrote to the bank, Government's Exhibit 83. I ask you whether you recall receiving that letter? A. No, I do not have any definite recollection, Mr. Behrens.

Q. Would your recollection be refreshed by referring to a letter that you wrote on April 20th, in which you refer to the prior exhibit? A. Yes, sir. This definitely establishes that I must have seen that.

Q. Let's see if we can straighten the record out.

The Court: The record is quite clear. 812

Mr. Behrens: I now offer in evidence the copy of the letter dated April 19, 1937, to Mr. Spies.

Mr. Cahill: I object to it, the mere fact that he may have seen it or that it is addressed to him.

The Court: He responded to it.

Mr. Behrens: He answered it.

(Marked Government's Exhibit 84.)

Mr. Cahill: Even then I object to the relevancy of it on the other grounds which I have stated.

The Court: Overruled.

Mr. Cahill: Exception.

Mr. Behrens: I now offer the original letter of March 20, 1937. 813

The Court: I assume there is the same objection?

Mr. Cahill: Yes, same objection.

The Court: There will be the same ruling.

Mr. Cahill: Exception.

(Marked Government's Exhibit 85.)

Q. Then we come finally to a carbon copy of the letter dated April 21, 1937, from the First National Bank in

answer to your last letter to them. Do you recall receiving the original of that? A. No definite recollection, Mr. Behrens.

Q. Now in connection with the closing of the custodian account at the First National Bank of Jersey City, did you take any steps securing the appointment of a successor custodian? A. Personally I did very little—

Mr. Cahill: I make the same objection.

The Court: Overruled.

Mr. Cahill: Exception.

815 A. (Continued) Personally I had very little to do with it. That was handled by another man in the office.

Q. Did you direct his activity in any fashion? A. I may have made some suggestions from time to time, yes.

Q. Was it finally decided that the successor trustee would be the Public National Bank & Trust Company? A. Yes, that is where this man had a friend, and he carried on the investigation almost exclusively.

Q. Were his negotiations the subject of conversations in which you participated? A. No, this man was there, Mr. Behrens.

Q. Would you answer the question?

Mr. Cahill: I think that is an answer.

The Court: Yes, that is an answer.

Q. Where did these conversations take place? A. I would say he did it largely at the Public National Bank, as to the subject of the custodianship.

Q. I show you what purports to be a certified copy of the resolutions of National Fund, Inc., dated April 8, 1937, and I ask you whether that is your signature on there, Mr. Spies? A. It is.

Q. That is the resolution which authorizes the Public National Bank & Trust Company to become the successor custodian? A. Yes, sir.

Mr. Behrens: I will offer it in evidence.

Mr. Cahill: I object to that on the same grounds.

The Court: Overruled. A resolution dated when?

Mr. Behrens: The date of the certification, your Honor, is April 8, 1937.

Mr. Cahill: I take exception.

(Marked Government's Exhibit 86.)

Q. Mr. Spies, I show you what purports to be a certificate of National Fund, Inc., dated April 9, 1937, which purports to be signed by you in two places. Will you tell us whether that is your signature? A. They are, yes, sir.

818

Mr. Behrens: I also offer it in evidence.

Mr. Cahill: I make the same objection. What is the date of it?

Mr. Behrens: April 9th.

The Court: Stock certificate?

Mr. Behrens: It is a certificate of resolutions, your Honor.

The Court: It has the signature of the officer?

Mr. Behrens: It appears to be an officer.

Mr. Cahill: In connection with these various things, a number have been received apparently because the defendant signed them. Whether he signed them or for instance somebody else signed them, what connection has that with the issues?

The Court: It would be perfectly proper for you to bring out and elaborate on that for the purpose of showing what he did and show the date of the paper and show that he did some work. Of course, the documents speak for themselves as to the character of work done.

819

Mr. Cahill: That is entirely insufficient even as to evidence of activity.

The Court: I overrule you.

Mr. Cahill: I take exception.

(Marked Government's Exhibit 87.)

Q. Mr. Spies, do you recall that in about the middle of April, 1937, there was a discussion among the board of directors of National Fund, including yourself, with reference to the advisability of getting a loan? A. I think so, sir.

Q. Is it your recollection that in connection with that a general loan collateral agreement had to be executed? A. I think so.

821 Q. I show you what purports to be such an agreement, dated April 14, 1937, signed by National Fund, Sidney J. Taylor, treasurer, and your signature appears on that. Do you recall ever seeing that agreement before? A. I would say definitely that I saw it because my signature is there, Mr. Behrens.

Q. Who was the counsel for this corporation in April, 1937? A. Well, I suppose that I could be considered counsel with Mr. Taylor also. He was an attorney and did almost entirely legal work.

Q. Do you recall any resolution of the board of directors relating to your appointment as counsel? A. I do not, but I would not be surprised if there were one.

822 Q. Would you say that you had nothing to do with advising the board of directors as to the propriety of making the loan and signing this agreement? A. Very little, I would say.

Q. Did you do anything? A. Yes, very little.

Mr. Behrens: I will offer it in evidence.

Mr. Cahill: I make the same objection.

The Court: Received for the limited purpose indicated.

(Marked Government's Exhibit 88.)



Q. With reference to this loan on April 15, 1937, is it your recollection that the first loan was \$7,500? A. I have no recollection Mr. Behrens.

Q. Is there some way that we could refresh it? A. I think you have a book.

Q. What book would you like to have, please? A. It is a book that you have that is in evidence.

Q. If I gave you the original loan record of the bank, that would help? A. I certainly think so.

Q. (Handing witness.) A. That indicates that the first loan was \$7,500.

Q. When was it made? A. April 15, 1937.

Q. What was the purpose of that loan, Mr. Spies?

Mr. Cahill: I think we are going further and further afield.

The Court: Make your objection. I sustain the objection.

Q. Referring to this record again, could you tell us when a part of that loan was first repaid (handing witness)?

Mr. Cahill: I object to that.

The Court: Sustained.

Mr. Behrens: Is it as to the form of the question or the materiality of it?

The Court: It is irrelevant to the issues in this case unless you first will lay the foundation that it had something to do with the payment or the making of the loan.

Q. Were you present at any meeting of the board of directors when the advisability or desirability of making a loan of \$7,500 was discussed? A. Mr. Behrens, I wouldn't know unless I could see the minute book.

Q. Very well, sir.

Mr. Brehens: May I have this minute book marked for identification?

The Witness: May I have a word with Mr. Cahill?

The Court: If Mr. Cahill wants to hear you.

The Witness: I just want to tell him that Mr. Dittmars has come.

Mr. Cahill: That is a character witness. I can put it on when it is convenient to your Honor.

The Court: When it is convenient to counsel, I am sure the jury will bear with us.

827

(Marked Government's Exhibit 89 for Identification.)

Q. I show you Government's Exhibit 89 for Identification and ask you what it is? A. It is the minute book of the National Fund from the inception of the company apparently through May 14, 1938.

Q. Would you be good enough to turn to the meeting of the board of directors of May 17, 1937? A. I have it.

Q. And then tell us whether you were there present at a meeting of the board of directors which considered the making of this \$7,500 loan? A. My name appears here as being present, and therefore I would say I was present.

Q. What was the purpose for which this loan was to be used?

828

Mr. Cahill: I object to that.

The Court: I will sustain the objection.

Mr. Behrens: I would like to show the operation of the defendant's mind, your Honor.

The Court: You may ask him what he did and what he thought.

Q. With reference to this loan of \$7,500, Mr. Spies, what in your opinion at that time was the purpose, or for what

purpose was the money going to be used? A. I can answer that generally. The only way I can answer it is to say for proper corporate purposes of the company, either expenses or investment. I do not believe I could be more specific, Mr. Behrens.

Q. When it came time to repay a part of that loan were you one of the directors who decided whether or not it should be repaid? A. I do not believe there was much question about deciding on it. I think it was a request by the bank for the loan to be paid and it was more or less automatic. That is my recollection.

Q. Who was it that selected the securities to be sold to repay the loan? A. That I do not recall.

Q. Would you say that you were not one of the men who decided that question? A. I cannot say I was one of them on that particular occasion.

Q. Let us see if we could refresh your recollection. We will pass that for the moment. Would you turn to the minutes of the National Fund which you have there and tell us whether you were present at a meeting of the board of directors on February 17 or 18, 1937? A. I find two meetings there, one on the 17th and one on the 18th.

Q. Would you say that you were present at both? A. The name appears here on February 17th, therefore I would say that I was present on that date.

Q. Who was it that prepared the minutes of the National Fund after you became associated with it? A. That was done by Mr. Taylor or myself. He did some of them. I think the rest—I think I prepared some of them myself.

Q. Will you look at the minutes of that meeting, sir? A. Yes, sir.

The Court: February 17?

Mr. Behrens: February 17, your Honor.

Q. You note that that was held at 3:30 and a resolution was adopted at that meeting whereby you were retained as counsel for National Fund? A. Yes, sir, I was.

832

*Murray R. Spies—Defendant—Cross.*

Q. Is there anything about Mr. Taylor being retained as counsel for National Fund? A. No.

Mr. Cahil: Just a moment. I object.

The Court: Overruled.

A. (Continued) Nothing in the resolution there about Mr. Taylor at all.

The Court: The witness has testified that he and Mr. Taylor were counsel for the company and this tests his credibility.

833

Mr. Cahill: I think he said that one may have acted and the other acted. I do not believe he gave any other testimony.

The Court: The weight is for the jury.

Q. Will you look at the resolution a little further and determine whether or not some provision was made or direction that the board of directors changed the payment of your fee as counsel?

Mr. Cahill: I object to that.

The Court: Overruled.

Mr. Cahill: Exception.

A. Yes, it has a monthly retainer fee by the board of directors.

834

Q. And the next paragraph, the next part of that paragraph. A. Do you want to take a look at it, Mr. Behrens (handing to counsel)?

Q. Yes. A. "Resolved that a reserve of \$250 be and hereby is set up for a payment of such legal fees as may be involved in such internal reorganization."

Q. Would you say that that money was actually paid to you as counsel for the corporation for services rendered before June of 1937?

Mr. Cahill: Just a moment. The 1937 income is not in issue here.

The Court: The question is whether he rendered services worth \$250. It is relevant, I think.

Mr. Cahill: I do not understand that issue is before the jury.

The Court: Whether he was unable to perform services, the fact that he performed services for which the company paid money would be a proper question on whether he was unable to render services. I have to overrule your objection.

Mr. Cahill: Exception.

A. The payment was—it was probably made in February or March of 1937, but I believe it was made, Mr. Behrens. 836

Q. You find a statement in the resolution referring to your advice to the board of directors. Did you have to spend a great deal of time going over a certain distribution contract between National Fund and Davis and Company? A. I do not see that, Mr. Behrens. Perhaps you can help me on that.

Q. Let me see if I can find it. Look at the bottom here on the fifth line. Will you read that to us? A. "The Chairman said that it was quite apparent that this distribution agreement entered into between National Fund and William H. Davis and Company for the distribution was valid and was necessary from the point of view of everybody. 837 Mr. Spies said that he had spent considerable time going over the agreement and the other documents and it was his opinion that the contract should be cancelled immediately."

Q. Would you say that you did spend a great deal of time going over documents, including this proposed contract? A. "Considerable" is to be taken into consideration with the amount—I would not say a considerable amount, as I think of it, Mr. Behrens.

Q. You did go over the documents, however? A. After a fashion, yes.

Q. And you gave an opinion to the board of directors that you thought it would be advisable to cancel the distribution contract which the Davis Company then held? A. Yes, sir.

Q. Would you also look at the same minutes of the meeting at which you present and tell us whether you participated in a discussion with reference to the change of the par value of the stock of this company? A. I would say so.

839 Q. Did you take all of the steps which were necessary legally to effect that change? A. With the group, yes, and I participated in that action.

Q. Who was it who prepared the notice to stockholders that a meeting would be called to change the par value? A. I know I collaborated on it.

Q. You did at least part of the work on it? A. I think so, Mr. Behrens.

Q. Eventually it would be necessary to change the certificate of incorporation and reflect the change of the par value? A. I would say so.

Q. You say you did some work on that also? A. The time I would not know, but I would not deny it.

Q. Is it a fact that at this meeting on February 18—

The Court: 17th.

Q. (Continued) 17th. I am sorry. That you were elected vice-president of the company and a member of the executive committee? A. Yes.

Q. You were also given the authority to sign checks on behalf of the company? A. I think so.

Q. Looking at the last page of the minutes of February 17, I think you will find something about an option, Mr. Spies. Maybe I am wrong. A. No, I think you are right. Yes.



Q. Did you hold an option to purchase stock of National Fund back in February of 1937? A. I do not recall the option, but it would appear from this resolution—it would appear that I did.

Q. Would you tell us what the terms of the option were?

Mr. Cahill: I object to that.

The Court: Sustained.

Q. As of what date was the option to be exercised? A. Apparently from this resolution it was to be exercised prior to April 1, 1937, at the asset value of the stock.

Q. You say "apparently from the resolution." Do you have any reason to doubt the accuracy of the minutes? A. 842  
No. But I say if an option existed, that actually the option existed outside of this resolution. But apparently from this the terms of the option were that it should be before April 1, 1937. I cannot recall aside from the resolution.

The Court: A written or verbal option or any option at all?

The Witness: I cannot recall that there was any specific option, except that this resolution refreshes me.

The Court: You say there was such an option?

The Witness: Yes.

The Court: Are you through with these minutes?

Mr. Behrens: Yes, I am.

The Court: This is a good place to take a recess for 843  
five minutes.

(Short recess.)

The Court: Are you going to call a witness out of order now?

Mr. Cahill: Yes.

Mr. Behrens: I suggest that we call all of the witnesses out of order who are available now.

The Court: Is that agreeable to you?

Mr. Cahill: I think he is the only one.

Mr. Behrens: I see Mr. Wayne is here. He is going to be called.

The Court: I hope the jury will bear with us while some witnesses are called out of order to facilitate their attendance at their private affairs.

(Witness Spies temporarily excused.)

WALTER E. DITMARS, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

845 *Direct examination by Mr. Cahill.*

Q. Mr. Ditmars, do you know the defendant Murray R. Spies? A. I do.

Q. How long have you known him? A. Since about 1926 or 1927.

Q. Did you employ him at any time? A. Yes.

Q. Are you connected with a manufacturing corporation? A. Yes.

Q. What is your office, may I ask? A. I am president.

Q. Of the Gray Manufacturing Company? A. Yes.

Q. Was Mr. Spies employed there? A. He was.

Q. When did that employment begin? A. It was approximately eighteen months ago.

846 Q. Do you know other people who know Mr. Spies in the communities in which he has lived? A. Yes.

Q. Do you know his reputation among them for honesty and truthfulness? A. So far as I know it is all right, very good.

Q. Will you say his reputation is very good? A. So far as I know.

Mr. Cahill: Your witness.

Mr. Behrens: I have no questions.

The Court: You are excused, Mr. Ditmars.

BEN SARGOY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

*Direct examination by Mr. Cahill.*

Q. Mr. Sargoy, do you know the defendant Murray R. Spies? A. I do.

Q. How long have you known him? A. Twenty-one years.

Q. Have you had social relations with him at times? A. At times, yes.

Q. Have you visited at his home and at his office? A. Yes.

Q. Did Mr. Spies ever express to you any fears that he had? A. Yes. 848

Q. What did he say to you along that line?

Mr. Behrens: May we fix the period of time before we proceed?

Mr. Cahill: Yes.

Q. Fix the time during which he made these statements, if he made any? A. I do not know the year. I know where he lived at the time. That will bring it back.

Q. Will you direct your attention to two specific years, 1936, and 1937. During those years did he talk with you on that subject? A. Yes.

Q. What did he say to you? A. Well, his main fears were suicide. 849

Q. Did he say that to you? A. Yes.

Q. Did he say anything about things that he feared to do? A. As to what?

Q. Anything that he feared to do, anything, experiences that he feared to face or anything of that sort? A. He did not seem to be able to work most of the time. I met him at the office and he was lying down on the couch.

Q. Did that happen more than once? A. More than once.

Q. Were you present when any doctors attended him? A. No.

Q. Did he ride in the subways with you? A. No, he had a fear of riding in subways. He used to take taxicabs.

Q. Did he tell you why? A. Well, because he feared jumping in front of a train.

Q. Did he say anything to you about any other similar fears? A. His family, and he generally—

Q. What about that? A. He had fears that he wanted to destroy them, too.

851 Q. Did you have any business relations with him? A. Yes.

Q. What business did you do with him? A. As a printer.

Q. As what? A. As a printer.

Q. For him personally or for the corporation? A. Both.

Q. Would you see him frequently during those years of 1936 and 1937? A. Oh, I would say on an average of once a week or once every two weeks.

Q. Did you visit at his home? A. I think about three times in the twenty-one years.

Q. Do you know other people in this city who know him? A. Yes.

852 Q. Do you know his reputation among them for honesty and truthfulness? A. It has always been very high for honesty and truthfulness.

Q. What? A. It has always been very high for honesty and truthfulness.

Q. Did he ever speak to you about any fear that he had of any particular disease?

Mr. Behrens: I object to this as leading the witness. There have been certain leading questions to which I did not object, but I feel now that he should not lead.

Mr. Cahill: I believe there was no objection to these questions. I have merely directed the attention of the witness to certain subjects. That is what I am doing now.

The Court: I overrule the objection. Leading questions are not permissible.

Mr. Cahill: I am directing his attention to the subject, which I understand is proper.

The Court: That is correct.

Q. Did he express any fears to you with respect to disease? A. Yes, sir.

Q. What did he say? A. Well, he thought that there was an unknown heart trouble and general nervousness.

Q. That is all that you remember of his fears, Mr. Sargoy? A. Yes, that is about all I can remember.

Mr. Cahill: That is all. Your witness.

*Cross-examination by Mr. Behrens.*

Q. Mr. Sargoy, during the two-year period to which you have referred would you say that your business relationship with Mr. Spies was a friendly one? A. Oh, yes.

Q. Did you have a fight with him about paying bills? A. No.

Q. He paid his bills promptly? A. Well, no.

Q. You were satisfied with the account? A. Well, yes.

Q. Did you have any argument with him over the amount of a bill that you submitted? A. No.

Q. At any time when you saw him was he completely prostrated so that he did not know you? A. No.

Q. Did you ever go to discuss business when he could not even talk to you? A. Partially.

Q. On how many occasions was that when he was like that? A. Oh, a few.

856

*Ben Sargoy—For Defendant—Cross.*  
*Stanley R. Wayne—For Government—Cross.*

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Q. Would you say that most of the time you had no difficulty in seeing him when you arrived at his office? A. I had no difficulty.

Mr. Behrens: I have no further questions.

Mr. Cahill: That is all.

(Witness excused.)

Mr. Cahill: Is Mr. Wayne here?

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857

STANLEY R. WAYNE, recalled as a witness.

Mr. Behrens: I do not believe this witness is being recalled.

Mr. Cahill: Yes.

Mr. Behrens: I believe this witness is here pursuant to a subpoena issued by the defendant.

Mr. Cahill: I wanted to be sure that he would get here.

The Court: Do you want him resworn?

Mr. Behrens: No. He is here as a witness for the defendant.

Mr. Cahill: No, I want to cross-examine further on some information that I did not have.

858

The Court: He is being recalled by the defendant for the purpose of further cross-examination?

Mr. Cahill: Yes.

The Court: That is your understanding?

Mr. Cahill: Yes.

Mr. Behrens: I object to that course. This is absolutely an unusual procedure, the witness having been offered and cross-examined and the government's case having been put in, the cross-examination of this witness now under the guise of calling him as a defense



witness pursuant to subpoena, and there is to be further cross-examination.

The Court: Any questions addressed to him which bring out matters which were not covered in direct, he will become the defendant's witness. I will permit him a further opportunity to cross-examine, on counsel's statement as to having overlooked something.

I assume that it is within my discretion.

Mr. Behrens: Yes, your Honor.

*Cross-examination (continued) by Mr. Cahill.*

Q. Mr. Wayne, you testified as to the closing of the \$40,000 transaction on June 11, 1936. Do you remember that? A. Yes, sir. 860

Q. You testified as to a check that was drawn on that occasion. Do you remember that? A. That is correct.

Q. Didn't you see a check made out to the order of Murray R. Spies on that occasion?

Mr. Behrens: I object to the form of the question.

The Court: Overruled.

A. I haven't any recollection of it.

Q. Do you remember testifying on another occasion on this subject? A. Yes.

Q. Do you remember being asked this question and giving this answer:

"Q. Wasn't there a check made out to Spies before he got the cash? A. Yes." A. I have no recollection of the question or answer, but if that is what the record discloses that must be the fact. 861

Q. Do you remember this question and answer following that question:

"Q. There was a check made out to his order? A. Yes."

A. I have no recollection of that either.

862 *Stanley R. Wayne—For Government—Cross—Redirect.*

Q. "Q. You saw him write his name on it? A. Yes."  
A. The same answer would apply. I have no recollection of either questions or answers. But if the record shows that, that is what I testified to.

Q. You say you did not so testify? A. If the record shows that, obviously that is what the testimony was.

Q. You have nothing to add to that at this time? A. No.

Q. Is that right? A. Nothing to add to those questions.

Q. When you testified before was your recollection clear as to the transaction? A. Yes. When you say "before" to which trial are you referring?

Q. You testified only once, isn't that so? A. No, sir, I testified once before in this particular case.

863 Q. In a trial? A. I testified in a previous trial, too.

Mr. Behrens: He has testified twice.

The Court: He testified on this trial and on another trial.

Q. I am speaking about your prior testimony. A. On the prior trial?

Q. Yes. A. What is the question?

Q. Was your recollection clear at that time? A. That was my best recollection at that time.

Q. Your recollection was as clear at that trial as it is at this trial? A. It was clear as it was at the time. Whatever I testified to was my best recollection at the time  
864 that I testified to it.

Mr. Cahill: That is all. Your witness.

*Redirect examination by Mr. Behrens.*

Q. Before you testified on the first trial did Mr. Whearty, the Assistant United States Attorney then in charge of the case show you any \$40,000 checks? A. No, sir.

Q. Do you recall several weeks ago that you were present in my office? A. Yes, sir.

Q. And I asked you about this transaction of June 11, 1936? A. That is correct.

Q. Do you recall at that time I showed you a check for \$40,000 which was made payable to the order of Donald P. Kenyon, endorsed by the payee and initialed by Mr. Grief? A. I recall you did show me such a check.

Q. When you did see the check was your recollection as to this transaction refreshed? A. When I saw the check my recollection was refreshed to the extent that I had no recollection of seeing a check made to Mr. Spies or Mr. Spies signing the check.

866

Mr. Behrens: No further questions.

*Recross-examination by Mr. Cahill.*

Q. That was the only check Mr. Behrens showed you on that occasion? A. That is correct.

Q. He did not show you another check made to the order of Mr. Spies? A. No, sir.

Q. Or a photostatic copy of it? A. No, sir.

Mr. Cahill: That is all.

The Court: Any more witnesses out of order?

Mr. Cahill: No more.

(Witness excused.)

867

The Court: You want to proceed with Mr. Spies?

Mr. Behrens: I thought there was to be another doctor here?

Mr. Cahill: No. I excused Dr. Sharpe. He was here. We will read the testimony of the other doctor.

MURRAY R. SPIES resumed the stand.

*Cross-examination (continued) by Mr. Behrens.*

Q. Mr. Spies, would you be good enough to look at the minute book of National Fund and turn to the minutes of the board meeting on February 18, 1937? A. February 18!

Q. Were you present at a meeting of the board of directors on that day? A. My name appears here as being present. I would say yes, Mr. Behrens.

Q. At that meeting were you elected a vice-president of the company? A. Yes, sir, first vice-president.

869

Q. Were you directed to prepare the necessary documents for the change of the certificate of incorporation necessitated by the change of the par value of the stock from one penny to one dollar? A. Yes.

Q. Did you prepare such a paper? A. I do not remember the actual preparation of it. I remember, Mr. Behrens, that I collaborated on it.

Q. Would you turn to the special stockholders meeting of March 17, 1937, and let us know whether you were present at that time; at the stockholders meeting? A. That I would not say. My name is not mentioned here.

Q. Perhaps I could help you. A. Please (handing book to Mr. Behrens).

Q. Would you read the beginning of that paragraph? A. "Messrs. Sydney J. Taylor and Murray R. Spies were duly appointed Judges to count the votes of the stockholders for and against the above resolution."

870

Q. Would you say that you were present on the occasion, present and counted the ballots in favor of and against this resolution? A. I do not remember it, Mr. Behrens. There could not have been more—that is my answer. I do not remember the actual counting of the ballots.

Q. However, you were a judge appointed for that purpose? A. Yes, sir.

Q. Will you turn to the regular board meeting of March 17, 1937, and tell us whether you were present at that time?

A. I would say yes.

Q. Do you recall that you were one of those who considered and voted in favor of the resolution at the time as to the par value of the stock of the company? A. I would say so, Mr. Behrens.

Q. Do you recall whether there was some discussion at that meeting with regard to the advisability of the corporation obtaining a loan? A. There is a resolution here having to do with that loan.

Q. What does that resolution say? A. "Resolved, that Murray R. Spies, Vice-president of this corporation be and he hereby is authorized to obtain a loan against the corporation's assets up to the amount authorized by the Certificate of Incorporation, it being understood that such loan may be obtained from Murray R. Spies as an individual upon as favorable terms as may be obtained elsewhere."

872

Q. Did you agree to the passage of that resolution? A. I would say so.

Q. Would you turn to the meeting of the board of directors of the corporation on April 7, 1937, and tell us whether you were present on that occasion? A. I would say yes to that question.

Q. Would you say that you acted as chairman of the meeting on that date? A. "In the absence of Mr. Keane, Mr. Spies acted as chairman." Yes.

873

Q. At the time was there presented to you as one of the members of the board of directors as well as to the other directors the proposal of ratifying and approval of the selection of this new custodianship agreement with the Public National Bank & Trust Company? A. Yes, sir.

Q. There was also some discussion authorizing Mr. Taylor to borrow money on behalf of the corporation? A. Yes, the resolution indicates that.

Q. You participated in the discussion and the ultimate determination? A. I would say so from this record, Mr. Behrens.

Q. You have no reason to doubt the record? A. No, sir.

Q. Will you turn to the special meeting two days later, April 9, 1937, and let us know whether you were present at that meeting? A. Yes, sir, I was.

Q. At that meeting was there some discussion as to who should be able to sign checks on behalf of the company? A. It would appear so from this resolution.

Q. You participated in the passage of that resolution? A. I would say I voted in favor of it, yes, sir.

875

Q. Is it a fact that at this meeting of the board a resolution was drawn whereby you would have to countersign all checks or else sign the checks alone?

Mr. Cahill: Just a moment, if the Court please. I do not wish to interrupt Mr. Behrens, but the question as to the mere vote of a director of a corporation indicates nothing of any activity and not the source of or regarded as relevant or material, and I object to the questions along that line. The fact that a man is recorded in a book as voting does not indicate the degree of concentration or any activity.

The Court: I will overrule your objection.

Mr. Cahill: Exception.

876

A. Are you waiting on me, Mr. Behrens?

Q. Yes. A. Would you read the question?

Q. (Read.) A. It is my recollection that that was the way it was done.

Q. Would you say from that point on that all of the checks drawn on the National Fund bank account bore either your signature alone or your countersignature? A. I do not know, Mr. Behrens, unless there was a subsequent resolution on that passed—



Q. Do you have any recollection of such a subsequent resolution? A. No, I do not think I recollect it one way or the other, Mr. Behrens.

Q. Referring to this meeting of April 9, 1937, will you tell us whether you personally ~~presented to the~~ board of directors the letter which has been received from Anderson & Allen, investment counsel to the company? A. Yes, it would appear so from this record.

Q. Would you say that you had considered the letter before presenting it to the board of directors and analyzed it? A. Yes, I think so, considered it, anyway.

Q. Would you tell us what Anderson & Allen recommended in the way of investment at that time? A. Well, I can best do it by reading the first paragraph. Is that satisfactory? 878

Q. Yes. A. This is sent to National Fund, Inc., "During recent declines we have been buying rather more heavily for our other accounts than for National Fund. Of course, we have no means of knowing whether this will prove profitable or not. It is certainly among the possibilities in the present situation that our 'long term selling point' will be penetrated, in which case we will unhesitatingly sell out all stocks."

Q. As a result of your analysis of that letter, Mr. Spies, did you make any recommendation to the board of directors as to what should be done by the company? A. It appears from this minutes that I said that "In view of this letter, it was advisable to maintain a margin account with Hemphill-Noyes & Co., within the scope of the provisions of the Certificate of Incorporation." 879

Q. The resolution was passed, I assume at that meeting authorizing you to open such a margin account at Hemphill-Noyes? A. Yes.

Q. Under the terms of the resolution it was you and you alone who had authority to open the account? A. To open an account, yes.

Q. Do you recall whether such an account was actually opened? A. I think there was an account opened at Hemphill-Noyes, yes, sir.

Q. Let us go along to the next meeting of the board on May 17, 1937, and I ask you if you were present at that meeting? A. It would appear so from this. My name is mentioned, Mr. Behrens.

Q. Now that was just a meeting of the members of the Board of National Fund, was it? A. It seems to me that a combined meeting of the directors of First Mutual and National Fund was held because of the fact that most, if not all, of the directors were on both corporations.

881 Q. Do you recall that the directors asked you for a legal opinion at that time as to whether or not they might validly hold a joint meeting of the directors of these two companies? A. Yes. I do not know that I should say that. I do not know whether they asked me or not, but there is an opinion of mine expressed here.

Q. Your expression of opinion was gratuitously given pursuant to some request? A. Yes, my opinion is set forth here.

Q. Will you tell us from these minutes the subjects which were discussed just at that meeting and any of the discussions where you took part? A. "The meeting had been called primarily to consider the advices received from investment counsel that market conditions, as shown from their chart, did not warrant the purchase of securities or  
882 any position in the market at this time."

That is the primary purpose of the meeting, apparently. I believe I took part in it. The next point seems to have been the change of the par value of the capital stock.

Q. Yes. A. And I took part in it. The next point was a general discussion as to the possibilities of the program.

Q. Did you participate in that, Mr. Spies? A. I would say so. Yes, Mr. Behrens.

Q. What was the other point? A. Then the question of joining with the First Mutual in a combined program of national distribution, and I took part in that. The resolution which was adopted carried out that thought of a joinder of interest, and I took part in that.

Q. Will you tell us the details of what you said to the board of directors concerning the prospects for the future? A. Shall I read it? I think that is the best way.

Q. Very well. A. "He (Spies) pointed out the possibilities of success in an fair market of a distributing program having for its medium of investment a set up—honest in conception and structure, good personnel and attractiveness for the dealer. He stated that Listed Securities furnished these requisites beyond most other trusts. He referred to the successes of other sponsors with less of a picture than was possible here. He went into the details of distribution, the states of importance to be qualified, such as Michigan, Missouri, Indiana, Illinois, California, Pennsylvania, Conn., New York, Ohio; that the country would be divided into three sections at first, West, Midwest and East and that the Midwest would be concentrated upon in view of past investment trust records. Mr. Spies stated that Mr. Davis as Vice-President in Charge of Sales of Listed Securities had signed a performance contract of distribution based on \$250,000 the first three months after effectiveness of registration in Washington. He pointed out that, all things being equal, distribution on a minimum of \$250,000 could be expected then and for each quarter thereafter between \$250,000 and \$500,000 up to the second year and thereafter a continuance in increasingly small advances until the point of saturation was reached. He made it perfectly clear that no member of the Board including himself could be assured of this distribution, but that based on operation, such distribution could be reasonably looked for. The profits on this kind of an operation were then considered—it was pointed out that gross income

would be about \$120,000"—there must be a mistake here \$120.

Q. A total of \$120,000? A. A total of \$120,000—"with operating costs running about \$50,000 to \$60,000. Mr. Spies stated that The First Mutual had already expended considerable sums of money in bringing the plans along to date and that within the next two or three months he expected that members of his family would contribute at least an additional \$10,000 for the purpose. He recalled that at the many informal conferences had by members of the board of this and of the First Mutual it seemed to all concerned, that in view of the similarity of purpose of both corporations in their own programs as planned, and that efforts would cover the same territories through the same dealers in all probabilities, that duplication of effort and expense could be avoided by going ahead together. Mr. Davis pointed out"—

Q. I think that is far enough to show your participation in it. After that meeting was over did you prepare a contract between the First Mutual Corporation and this National Fund, so that their interests might be combined in the purchase and sale of stock known as listed securities? A. There is a contract prepared here, but I do not recall whether I prepared it or Mr. Taylor or the two of us together. I would say it was more likely the latter, a collaboration between Mr. Taylor and me.

Q. What is the date of that contract? A. May 14, 1937.

888 Q. That is a sort of letter contract? A. Yes.

Q. To whom is the letter addressed? A. First Mutual Corporation.

Q. That is the corporation in which you and your wife had a majority interest? A. That is right.

Q. Who signed this letter? A. I think it was National Fund, Inc.

Q. During this period of time this refers to considerable moneys already having been expended by First Mutual on this program. Right? A. Yes, sir.

Q. What did you have if anything to do with the expenditures of money during this period, say, the first of the year down through April of the First Mutual Corporation? A. I would say I had considerable to do with the expenditure of First Mutual's money.

Q. You signed all checks of First Mutual? A. I think so, Mr. Behrens.

Mr. Behrens: I wonder if I could have what purports to be a cash book marked for identification, just page 49 of this cash book marked for identification?

(Page 49 of cash book marked Government's Exhibit 90 for Identification.)

890

Mr. Cahill: Cash book of whom?

Mr. Behrens: National Fund.

Q. A few minutes ago we were discussing the question of your being retained by National Fund as its counsel under a resolution and \$250 being set up to pay the fee. I should like to show you Government's Exhibit 90 for Identification and ask you if you can tell whether or not you performed these services and were paid for them (indicating)? A. Well, I do not think I could tell it from this, just a cash book.. It was probably kept by someone else, certainly not by myself. I admit that the fee was paid.

Q. Could you give us the approximate date? A. No, I 891  
do not believe I could—yes, I think I could. February or March of 1937.

Q. February or March? A. Yes, sir, that is my best recollection.

Mr. Behrens: Would you be good enough to mark the check book of National Fund, Inc.?

The Court: February or March of 1937?

The Witness: That is my recollection. I know I received it.



Mr. Cahill: 90 and 91 are marked for identification?  
The Court: That is correct.

(Book marked Government's Exhibit 91 for Identification.)

Q. Have you ever seen this book before, the cash book, Government's Exhibit 90 for Identification? A. I probably have, Mr. Behrens.

Q. Has your attention ever been directed at any other time to the same item that I now direct your attention to, as to the date when you received payment of this legal fee? A. It may have been, Mr. Behrens, but I have no definite recollection at all.

Q. It is your testimony now that you could not do anything with this cash book? You would not be able to explain anything from it? A. No, I did not say that at all.

Q. Would you look at the item dated April 15? A. Yes, sir.

Q. 1937, for \$550. Tell us whether you can explain what that is? A. No, I cannot.

Q. You say you cannot explain that? A. No, sir. There is no discussion at all opposite the item, Mr. Behrens. It is just blank (indicating).

Q. Do you see this statement here opposite the legal fee of \$250 "Exchange check \$300"? A. Yes.

Q. Can you now tell us what the \$550 was for? A. No, because the exchange check does not recall anything to my mind.

Q. Forget it. What was the \$250 on April 15 for? A. It is legal fees, \$250.

Q. Would you say that that was in all likelihood the \$250 that you spoke about? A. I know there was only one \$250 fee paid.

Q. That is the one you mean? A. Yes. I think that was a check, the fee paid to me.



Mr. Cahill: April what?

Mr. Behrens: April 15.

The Witness: April 15, 1937.

Q. Mr. Spies, I wonder if you would be good enough to look at a group of photostatic copies of letters all of which purport to be signed by you in the year 1937, at various dates, all addressed to Marine Midland Trust Company, and tell me does your signature appear on all of those letters? A. Yes, they are all my signatures.

Mr. Behrens: I would like to offer them in evidence as one exhibit and then give your Honor the dates of the various letters (handing to Mr. Cahill).

896

Mr. Cahill: I object to them on the ground that they are not relevant, and the mailing and signing indicates nothing that would make them admissible (handing to the Court).

The Court: They are offered for the purposes to show business activity on the part of this defendant during 1937?

Mr. Behrens: Yes, your Honor.

The Court: I will receive them for that purpose and not for any other purpose. Objection overruled.

Mr. Cahill: Exception.

(Marked collectively Government's Exhibit 92.)

Mr. Behrens: These letters are dated February 3, 1937; there are two letters on that date; March 22, 1937; March 27, 1937; September 9, 1937; November 22; November 29; December 29; all in 1937.

The Court: In what capacity are they signed?

Mr. Behrens: They are all signed by Murray R. Spies on behalf of Distributors Fund, Inc.

The Witness: That cannot be, Mr. Behrens.

Mr. Behrens: I am sorry. The name of the corporation, of course, was changed, so that we will say

that the first three letters are signed as Distributors Fund—the first two letters are signed Distributors Fund by Murray R. Spies, vice-president.

The letter of March 22 is on the letterhead of Murray R. Spies, and signed by him individually.

The letter of March 27 is also on the letterhead of Murray R. Spies and signed by him individually.

The letter of September 9 is on the letterhead of First Mutual Corporation by Murray R. Spies.

The letter of November 22 is on the same letterhead and signed in the same fashion.

So is the letter of November 29, and so is the letter of December 29.

Q. Mr. Spies, would you say that wherever we find a letter bearing your signature down in the corner and the initials "M. R. S." that you actually dictated that letter?

A. No.

Q. Would people dictate a letter and put your initials on it? A. Yes.

Q. There is no question about your signature? A. No.

Q. If you dictated a letter did you put your initials on it? A. Only, of course, in the office, when I was in the office.

Q. One can never tell who dictated a letter? A. That is to indicate the responsibility, but not so much the party who dictated it. I take the responsibility for those letters, of course.

Q. I show you what purports to be an original receipt dated April 5, 1937, purporting to be signed by you and ask you whether that is your signature and whether you signed the receipt for the stock on or about the date indicated? A. I would say so.

Mr. Behrens: I will offer it in evidence. It is dated April 5, 1937.

Mr. Cahill: I make the same objection.

The Court: Same ruling.

Mr. Cahill: Exception.

(Marked Government's Exhibit 93.)

Q. I show you a letter dated May 20, 1937, addressed to Mr. Harry N. Gill, G-i-l-l, purporting to bear your signature. Will you tell us whether you identify your signature on that? A. Yes, I do.

Q. By referring to that letter can you tell us whether prior to that date you had some correspondence with Mr. Gill? A. Yes, I think there was, Mr. Behrens.

Q. Did you exchange telegrams with Mr. Gill? A. I do 902  
not know whether I did or Mr. Davis did, but it would appear from this as if telegrams were exchanged.

Q. Would you say that you had a telephone conversation with Mr. Gill at or about this time? A. I cannot recall, Mr. Behrens.

Q. Does that letter indicate anything to you about that? A. I cannot see it, Mr. Behrens.

Mr. Behrens: I may be mistaken. I will offer it in evidence (handing to Mr. Cahill).

Mr. Cahill: I object to that, your Honor; in that connection I object to it on the ground it is irrelevant and immaterial. I think that this mass of correspondence contains matters which without exception are to extend the trial and are irrelevant things and may be 903  
very prejudicial (handing to the Court). We certainly cannot go into that on this trial.

The Court: You are addressing a special objection to this letter?

Mr. Cahill: Yes, sir. I make that point with respect to it.

The Court: I have your point. I will sustain the objection with respect to this particular letter. You

may bring out on the examination and state the contents of the letter, but I am going to exclude the letter by reason of the fact that it may be prejudicial and for other reasons.

Mr. Behrens: Suppose we withdraw this.

The Court: You have on the record that the letter was written. Reference was had to other letters. If you want to bring out some other facts which would indicate the fact of his business connection, I will allow you, but I can see that there is real merit in Mr. Cahill's objection.

Mr. Behrens: I wonder if I could have so much of the letter as is indicated in the last sentence of the first paragraph. I do not think it would be prejudicial at all, your Honor (indicating).

Mr. Cahill: Perhaps none of it might be debated at length, but after all we have the offer and proof of writing the letter.

The Court: I exclude it.

Mr. Behrens: Entirely, your Honor?

The Court: Yes.

Q. Now, I show you a letter dated May 21, 1937—

The Court: Just before you go on, do you want to mark it for identification?

Mr. Behrens: I cannot.

The Court: Do anything about it?

Mr. Behrens: No.

The Court: All right.

Q. I show you a letter dated May 21, 1937, which purports to bear your signature and to which are attached two carbon copies of letters dated May 13 and May 19, 1937, and I wonder if you can tell us whether that is your signature? A. It is.

Q. Did you consider these two carbon copies of letters which had been sent to Mr. Davis before you wrote the answer? A. The only recollection I have on that is that the first paragraph of my letters refers to that, Mr. Behrens. I do not remember that.

Q. You probably read them at least before you answered them? A. I would say so.

Mr. Behrens: I would like to offer this letter and the others, too (handing to Mr. Cahill).

Mr. Cahill: The same objection is made as to these. If he goes into the relations of every person—we cannot go into that.

The Court: If you object on the ground of relevancy, I will overrule it. If you object to it as particularly prejudicial, I will consider it. 908

Mr. Cahill: I meant to include prejudice in the ground as to relevancy.

The Court: I won't let you do it now. It is too late in the game.

Mr. Cahill: I think that it is understood that the introduction of irrelevant matter that may be confusing may not be offered.

The Court: I won't let you take a new objection now.

Mr. Cahill: I am not standing on the old one but qualifying it and insisting upon it, your Honor (handing to the Court).

The Court: I will overrule your objection with respect to the letter of May 21. 909

With respect to the letter which is annexed to it dated May 19, I will sustain the objection.

With respect to the copy of the letter dated May 13, for the reason I have indicated in my previous ruling, I am overruling the objection.

With respect to the letter of May 21, I will overrule the objection for the reason that it constitutes an admission against interest.

910

*Murray R. Spies—Defendant—Cross.*

Mr. Cahill: May I respectfully except?

Mr. Behrens: Could we have these separately marked?

The Court: Yes. I do not want to refer to the character of the admission unless counsel wants it.

(Marked Government's Exhibits 94 and 95.)

Q. I show you, Mr. Spies, what purports to be a letter written by you on August 26, 1937, to Mr. George L. Chilson, C-h-i-l-s-o-n, and ask you whether you recall sending that letter? A. Yes, I do, Mr. Behrens.

911

Mr. Behrens: I offer it in evidence.

The Court: What is the date?

Mr. Behrens: August 26, your Honor, 1937.

Mr. Cahill: I object to that as irrelevant and introducing matter that might be prejudicial.

The Court: I will admit it for the limited purpose already indicated.

(Marked Government's Exhibit 96.)

The Court: At the proper time I shall take opportunity to charge the jury as to the matter of the business transactions embraced in the communications so as to make sure that we are trying just this one case and no other.

912

Mr. Behrens: I have no intention of going into these business transactions except to show that they were business transactions in which the defendant participated.

The Court: They are being admitted for that purpose.

Mr. Behrens: Not for showing any insinuations as to the defendant.

The Court: Not at all.



Q. Here is one of October 27, 1937, addressed to Mr. Gill. Do you recall signing that letter? A. Yes, I do.

Mr. Behrens: It may save time if I do identify a couple more and let counsel look at them all at once. Here is one of November 26.

The Witness: I think that one, Mr. Cahill, ought to be looked at individually.

The Court: I will look at them all.

The Witness: Yes, sir.

Q. The one of December 21, 1937, to George Barnum, B-a-r-n-u-m, & Company? A. Yes, sir.

Q. Do you recall that? A. Yes.

914

Q. Here is a photostatic copy of what purports to be an agreement between the First Mutual Corporation and by you and Mr. Biscoe, dated December 31, 1937. A. Yes. I do not believe this agreement was ever effectuated.

Q. I ask you whether you signed it? A. Yes, sir, I did.

Mr. Behrens: I should like to offer these last four exhibits after counsel has had an opportunity to look at them.

The Court: You are offering them now?

Mr. Behrens: I am offering them now.

Mr. Cahill: Keep the order of time and dates according to chronology.

Mr. Behrens: Yes. Could we have a number assigned to each of them? What is the next number, Mr. Sweeney? 915

The Court: The next number would be 97.

Mr. Cahill: I object to all of these.

The Court: All four?

Mr. Cahill: As irrelevant and, on the ground that the matters which are the subject of these letters cannot be gone into fully now, and they are presently

916

*Murray R. Spies—Defendant—Cross.*

in an incomplete state. They are so likely to be prejudicial that no instruction can avert the prejudice. We cannot go into them now.

The Court: I will exclude the letter of October 27, 1937.

I will allow the letter of November 26, 1937.

I will exclude the letter of December 21, 1937.

I will allow the agreement of December 31, 1937.

Mr. Cahill: I respectfully except to both.

(Marked Government's Exhibits 97 and 98.)

The Court: The exception is granted. I think we will now adjourn until tomorrow morning at 11 o'clock.

(Adjourned to Thursday, August 14, 1941, at 11 o'clock A. M.)

917

New York, August 14, 1941,  
11 A. M.

TRIAL CONTINUED.

MURRAY R. SPIES resumed the stand.

*Cross-examination (continued) by Mr. Behrens.*

918 Q. Mr. Spies, I show you Government's Exhibit 91 for Identification, which purports to be a check book of National Fund, Inc., beginning with check No. 1, which is apparently May 8, 1937. I wonder if you would be good enough to look at the exhibit and tell us if any of the checks during 1937 or any of the entries in the check book during 1937 are in your handwriting? A. Yes, sir.

Q. If you find any will you be good enough to give us the check number and the date of the check? A. Check

No. 2, dated May 8, 1937, in the sum of \$100. There is one here that I am not sure of, No. 17, dated June 29, 1937, in the sum of \$25.

Q. That may be yours and may not? A. Yes, sir. Check No. 23, dated July 28, 1937, in the sum of \$500.

Check No. 25, dated August 25, 1937, in the sum of \$500.

Check No. 26, dated August 25, 1937, in the sum of \$150.

Check No. 27, dated August 25, 1937, in the sum of \$85.

There is another one that I am in doubt about, No. 48, dated November 8, 1937, in the sum of \$1,000. I do not believe that is my writing, Mr. Behrens. I am not certain.

Q. Very well. A. Check No. 53. Do you wish me to go through the entire check book?

Q. Just for the year 1937. A. That is all, I believe, Mr. Behrens.

Q. I show you five checks of National Fund, No. 325, 326, 327, 329 and 330, and ask you whether your signature appears on each of those checks?

920

Mr. Cahill: What are the dates?

Mr. Behrens: They are all dated in March, 1937.

Mr. Cahill: By whom?

The Witness: National Fund, by Murray R. Spies, vice-president. They are all my signatures.

Mr. Behrens: I would like to offer these checks in evidence and then I will give the dates (handing to Mr. Cahill).

Mr. Cahill: Since they are offered without limitation and do not appear to be relevant on the issue, I object to them. 921

The Court: Objection sustained: The jury knows the things that this defendant did signing these checks. If that is all you want to prove, we have the evidence and the documents themselves will not further assist us in that matter.

Mr. Behrens: I would just like to get the dates before the jury.

The Court: You may do that.

Mr. Behrens: Will you read us the dates?

The Court: And the amounts, if you would like to indicate the magnitude of the transaction, but as to the rest of them I am not sure unless you claim relevancy.

Mr. Behrens: I do not claim relevancy. I am only interested in the dates and the amounts.

The Witness: March 13, 1937, \$210.54; March 25, 1937, \$75; March 25, 1937, \$7; March 18, 1937, \$20; March 18, 1937, \$2,200.

923 Q. I show you what purports to be a certain contract dated March 25, 1937, and ask you whether you prepared that contract? A. No, I believe Mr. Taylor and I prepared it.

Q. At least you assisted in the preparation of it? A. Yes. This was taken, in substance, from another agreement.

Mr. Behrens: I would like to offer it in evidence (handing to Mr. Cahill).

Mr. Cahill: Since it is offered without limitation, I will object to that also. That is not relevant.

Mr. Behrens: I offer it for the purpose of showing the defendant's activities in the year 1937.

924 The Court: I will receive it for that limited purpose. I again instruct the jury that the documents are offered purely for the purpose of showing the character of the activities that the defendant engaged in at the time, to show his mental and physical capacity. It is not admitted for the purpose of proving the transactions embraced in these documents. With that limitation I will admit the document.

Mr. Cahill: I respectfully except.

(Marked Government's Exhibit 99.)

Q. Mr. Spies, I show you—

Mr. Behrens: Would it be all right to attempt to put this in, rather, as one exhibit instead of going through them and marking each one of these separately for identification? Would Mr. Cahill object to that?

The Court: Suppose you make your offer and Mr. Cahill may not object.

Q. I would like you to look at this bundle of papers, 44 in number. Will you tell us whether your signature appears on each of the papers?

Mr. Cahill: 44 papers?

926

Mr. Behrens: Yes, 44.

A. You mean each individual paper?

Q. Just the top one? A. Just the top (indicating)?

Q. Yes. A. This letter of transmittal?

Q. Yes, that is right. A. I better put on this side those that I find my signature.

Q. Yes. A. This is my own signature (indicating). This blue-covered one has the signature of myself and of Mr. Taylor (indicating). This also has a double signature.

Q. Has what? A. A double signature.

Q. Your signature and Mr. Taylor's? A. No, a Mr. Luyendyk. A double signature again, Mr. Taylor's and mine (indicating). That is all except one or two.

927

Q. You put to one side the copy of a letter that got in there? A. Yes. Shall I take it out?

Q. Yes, please. A. All of these have my signature and just a few, not more than three, I believe, have my signature and either Mr. Taylor's or Mr. Luyendyk's.

Q. Without going into the specific month or date, you notice they are all in 1937? A. I think so.

Mr. Behrens: I will offer the bundle in evidence again merely for the purpose of showing his activity during the year 1937.

Mr. Cahill: I object to these if the Court please.

The Court: Before you state your grounds, let me look at them.

Mr. Cahill: (Handing to the Court) I would like to state my ground.

The Court: I will permit you to do that. Just let me look at them.

Mr. Behrens: The things which are attached to them are not included in my offer. It is just the pages which bear Mr. Spies' signatures and not the other sheets attached to them. I can remove them physically, if you desire.

The Court: Let counsel step up, please.  
(Discussion at the bench, off the record.)

Mr. Cahill: I object to the exhibits on the ground that they are irrelevant and would unnecessarily encumber the record.

The Court: I sustain the objection.

Q. On April 12, 1937, did you write a letter to the Public National Bank & Trust Company of New York, in behalf of National Fund authorizing them to deliver to Hemphill-Noyes 100 shares of United States Rubber Company stock?

Mr. Cahill: I object to that question on the same ground.

The Court: Overruled.

Mr. Cahill: Exception.

A. Mr. Behrens, I certainly did. Whether it was done by me or not, I do not know. It is more or less of a form letter.

Q. Would you say that you read the letter before you signed it? A. I believe so.



Q. On April 15, 1937, did you write a letter to the same institution asking them to deliver to Hemphill-Noyes a check in payment of fifty shares of Boeing Airplane stock which was then on deposit and apply the proceeds of the check to reinstate the collateral which that institution held?

Mr. Cahill: Without repeating the objection, your Honor will understand that I am objecting to this line:

The Court: Exception noted. I have given you an exception to the line of questioning. It does not go to prove the substance of the contents of the letter.

A. I make the same answer. It is my signature. As to whether or not I wrote this letter or dictated it, I cannot say. 932

Q. In all instances wfil you say you read the letter before signing it? A. Not all. I imagine there were some turned in which were made on the instructions of Mr. Davis which I may have signed, on his statement or the bookkeeper's statement that the transaction was an order.

Q. You read it before you affixed your signature? A. No. If my secretary handed me a letter saying Mr. Davis instructed such to be done, and if I were not feeling too well, I would have signed them. That was the custom on two or three occasions. Generally speaking, I would say I read what I signed before signing.

Q. As to the letters offered, would you say you read or did not read them before you signed them? A. I haven't 933 any definite recollection, but I would say that the probability is that I read them.

The Court: Were you at your office at the time you signed the letters?

The Witness: Some I know I signed at home in bed. That is why I am qualifying my remarks.

Q. On April 19 did you write another letter about the delivery of stock to the same company? A. I make the same answer, Mr. Behrens.

Q. On October 21, 1937, did you write a letter to the same institution, sending them a certificate which the institution required in connection with National Fund matters? A. I make the same answer.

Q. On April 25 did you also write a letter to the same institution certifying that Dean & Company were nominees? A. Same answer.

935 Q. On April 21 did you make out a certificate indicating the amount of the loans outstanding on behalf of National Fund? A. I believe that—I feel surely that I read this one.

Q. On April 30 did you send a letter to the same institution, sending them some certificates which they required? A. I make the same answer as to the preceding questions. I may or may not have read it, that is true, but the probability is that I did.

Q. On April 30 did you sign an affidavit and swear to it before a notary public in connection with the loan of \$7,500 by National Fund? A. That is one that I undoubtedly read.

Q. On April 30, 1937, did you write another letter to the same institution authorizing the delivery of securities? A. I make the same answer to this as to the others.

Q. On May 14 did you write the same institution a letter authorizing the transfer of \$2,000? A. I probably read this one, true.

936 Q. On May 21 did you write the same institution a letter authorizing the acceptance of shares of stock? A. I make the general answer on this one.

Q. On June 11 did you write a letter to the same institution authorizing them to deliver certain shares of stock against receipt of certain payments? A. This is one that I could—at least I feel I did not write or dictate because I was home in bed on June 11.

Q. Did you read this before you signed it? A. I would say so, but I could not say definitely.

Q. On June 29, 1937, did you write a letter to the same institution authorizing them to receive shares of stock? A. I do not remember this one at all.

Q. Is that your signature? A. I believe I was home. My signature is on this. I believe I was home in bed on this date also.

Q. Would you say that in all likelihood you read the letter before you signed it? A. I think so.

Q. On June 30, did you write them a letter authorizing the delivery of stock? A. I make the same answer on this.

Q. Here is an undated letter referring to telephone instructions on June 13. I ask you whether you signed such a letter? A. Mr. Behrens, that is what I was talking about, taking these out— 938

Q. I ask you if you signed that letter? A. I signed the letter.

Q. That is all I would like to know. On June 8, 1937, did you send a letter to the same institution authorizing the delivery of stock to Hemphill-Noyes? A. I signed this letter.

Q. There is another one here undated referring to a conversation about telephonic directions on June 8th. Did you sign it? A. Yes, that is my signature.

Q. Did you sign this letter of July 12, 1937, authorizing them to accept telephonic instructions from Mr. Davis on the purchase and sale of securities? A. Yes.

Q. I assume that the question of Mr. Davis' authorization was the subject of conversation between you and Mr. Davis at or about this time? A. Yes, it was. 939

Q. On June 28, 1937, did you sign an affidavit in connection with a loan of \$7,500 on behalf of National Fund? A. That is my signature.

Q. Would you say that in all likelihood you read that affidavit before you affixed your signature? A. I think so.

Q. On July 28, 1937, did you sign this certificate indicating the amount of outstanding loans of National Fund? A. Yes, sir.

Q. On July 29 did you send the Public National Bank a letter authorizing them to receive certain shares of stock?

A. I make the same general answer as to this letter.

Q. On August 20 did you sign a letter to the same institution confirming telephonic instructions about sale instructions? A. Telephonic instructions of Mr. Davis?

Q. Yes. A. Yes, I signed this letter.

Q. There is a similar letter dated August 20, 1937. Did you sign that one too? A. Yes. This was instructions given to Mr. Davis.

Q. These letters are written confirmations to the Public National Bank of telephonic instructions which Mr. Davis had given? A. These letters are in a form prepared at the office, and I signed them.

941

Q. On August 25, 1937, did you sign a certificate with respect to the outstanding loans of National Fund? A. I did.

Q. On August 26 did you sign this application for a loan of \$700 with certain collateral to be held for the repayment? A. I did.

Q. On August 26 did you sign another certificate concerning the outstanding indebtedness of National Fund at that time? A. I did.

Q. There is no date on this one. This letter is addressed to Public National Bank confirming telephonic instructions on August 27, telephonic instructions of Mr. Davis? A. Right.

942

Q. On August 30, 1937, did you sign an affidavit in connection with a loan of \$1,000 by the bank to National Fund? A. I did.

Q. On August 30 did you also sign— A. (Continued) This last one is one with the joint signatures of Mr. Taylor and myself.

Q. Mr. Taylor's signature also appears there? A. Yes.

Q. Would you say that before you executed that affidavit that you probably read the contents of it? A. Yes.

Q. On August 30, 1937, did you sign and swear to a similar affidavit in connection with a loan of \$700? A. Yes, sir.

Q. Would you say that you probably read that affidavit before you signed it? A. I would think so.

Q. I show you six letters, all undated, addressed to the Public National Bank & Trust Company and all refer to telephonic instructions of September 30, 1937, authorizing Mr. Davis to buy and to sell securities. I ask you whether you signed these written confirmations of the purchase and sale?

The Court: When? What year?

Mr. Behrens: September 30, 1937, your Honor.

944

A. Yes, sir, I did.

Q. Did you sign a similar one on or about October 4, 1937? A. Yes, sir.

Q. And then another one on September 30, 1937? A. Yes, sir.

Q. On October 27, 1937, did you send a letter to this institution authorizing it to receive telephonic instructions from two men other than yourself to buy and sell securities on behalf of National Fund? A. Yes.

Mr. Cahill: To what concern?

Mr. Behrens: All these letters are addressed to the Public National Bank & Trust Company.

945

Q. On October 29, did you send a letter to the same institution directing them to deliver shares of stock against a certain purchase price? A. I did.

Q. I find another confirmation of September 30, 1937, and ask you whether you signed that? A. I did.

Q. And a confirmation, undated, referring to instructions to sell securities on December 9, 1937? A. I did.

Q. And another one of the same date? A. Yes, sir.



946

*Murray R. Spies—Defendant—Cross.*

Q. And on December 31, 1937, did you sign a letter to the same institution instructing them to deliver certain shares of stock to Heinphill-Noyes in payment as to one of \$4,400 and the other of \$43? A. Yes, sir.

The Court: Your objection to all of the foregoing questions is noted and an exception allowed.

Mr. Cahill: Thank you.

Q. I would like to show you this folder, Mr. Spies. Can you tell me whether you had anything to do with the preparation of it (handing witness)? A. I did.

Q. You did? A. Yes, sir.

947

Q. Would you say about when this folder was prepared? A. I would say the substance of it before March or April of 1937.

Mr. Behrens: This blue folder I would like to offer in evidence.

The Court: Did the witness testify that he prepared it?

Mr. Behrens: Yes.

The Witness: No, I testified that I participated in it in the preparation of it.

Mr. Behrens: I am sorry.

Mr. Cahill: Just what is in here?

Mr. Behrens: I do not care what is in it.

948

Mr. Cahill: That does not clear that up.

The Court: You look at it and determine for yourself.

Mr. Cahill: There was no occasion for any discussion about it. There were a number of other papers taken out of this folder. I want to know whether there was any thought or intention of including this or this in the folder now. I wish to examine it. There was no mystery about it.



The Court: Let us calm down and we will get along better. At the present time there is an offer of the document that you have in your hand.

Mr. Cahill: I make the same objection as to the irrelevancy of it.

The Court: May I look at it?

Mr. Cahill: Yes (handing to the Court).

The Court: I overrule your objection.

Mr. Cahill: I respectfully except.

(Marked Government's Exhibit 100.)

Mr. Behrens: I would like to have what purports to be the preliminary part of the prospectus of Listed Securities in August, 1937, marked for identification. 950

(Marked Government's Exhibit 101 for Identification.)

Q. I show you Government's Exhibit 101 for Identification, and ask you whether you have ever seen that before, Mr. Spies? A. I think I have, Mr. Behrens.

Q. Did you assist in the preparation of that prospectus? A. I participated in it, yes, sir.

Q. Around what time would you say that you participated in the preparation of it? A. I would say, Mr. Behrens, that the substance of this was prepared before May 1, 1937, when the documents were submitted in preliminary form to the Securities & Exchange Commission on an application for registration. 951

Q. You say that an application was made with a prospectus in May of 1937? A. Yes, sir.

Q. Did you have anything to do with the preparation of that prospectus which was submitted in May? A. I did have something to do with the preparation of this prospectus, but whether I had to do in May or not, I do not know. Mr. Taylor handled the registration almost exclusively.

952

*Murray R. Spies—Defendant—Cross.*

Q. Do you know the amount of work that you may have done in connection with the prospectus in May? A. No, I think a very minor part. Whether I had anything to do with it in May or not, I do not know.

Mr. Behrens: I should like to offer Government's Exhibit 101 for Identification in evidence (handing to Mr. Cahill).

Mr. Cahill: I object to that as not relevant and also as cumulative.

The Court: Admitted for the limited purpose of showing the defendant's activity and the character of his activity.

953

Mr. Cahill: I respectfully except.

(Government's Exhibit 101 for Identification now received in evidence.)

Q. Mr. Spies, in connection with this Government's Exhibit 101, I should like to call your attention to page 8 over on this side (indicating), and I ask you whether you recall during 1937 giving a legal opinion on the validity of the stock to be issued by Listed Securities? A. I think I did give a formal opinion.

Q. Would you fix the date, please, or the approximate date? A. It was some time probably before May of 1937. I imagine it accompanied the application for registration, which was made in May of 1937.

954

Mr. Cahill: Securities of what corporation?

The Witness: Listed Securities.

Mr. Behrens: Listed Securities.

Q. Did you ever see this before, Mr. Spies (handing to witness)? A. Yes, sir.

Q. Did you assist in the preparation of it? A. I did.

Mr. Behrens: I should like to offer it in evidence, but before doing so I would like to ask a question.

Q. Tell us about when you did participate in preparing it? A. I would say prior to May, 1937, but, Mr. Behrens, I want it understood that I am basing these answers on the fact that the application for registration was filed in May of 1937, and I believe these documents accompanied that application.

Mr. Cahill: I make the same objection to this, and I call your Honor's attention to the nature of this document, bringing in many confusing elements in the case.

956

Would your Honor like to read this?

The Court: Yes, I will take a look at it. I overrule your objection.

Mr. Cahill: I respectfully except.

(Marked Government's Exhibit 102.)

Q. Also in connection with Listed Securities did you ever see this before, Mr. Spies (handing witness)? A. Yes, sir.

Q. Did you assist in preparing that? A. I do not remember, but I would say I had something to do with this one.

Q. About when, would you say? A. About the same time.

957

Mr. Behrens: I also offer this in evidence. It contains a certificate of incorporation, by-laws and so forth, of Listed Securities.

Mr. Cahill: Without going into detail, I make the same objection.

The Court: Same ruling; admitted for the limited purpose that I have indicated to the jury before.

(Marked Government's Exhibit 103.)

Q. The last one, Mr. Spies, is the blue pamphlet in connection with Listed Securities? A. I make the same answer, limited participation in this.

Q. You put it somewhere around May of 1937? A. I am not sure in this case. This was prepared almost entirely by Mr. Davis. I do not believe this accompanied the application for registration, Mr. Behrens.

Q. About when would you say you did review it or participate in its preparation? A. I would say it was after May, 1937.

Mr. Behrens: I also offer that in evidence.

Mr. Cahill: Same objection.

The Court: Same ruling.

Mr. Cahill: Exception.

(Marked Government's Exhibit 104.)

Q. Mr. Spies, would you tell us the date when information was first brought to you personally that Mr. Kenyon was interested in paying you a sum of money for you to sever your connection with the companies? A. I would say it was in—

Mr. Cahill: I think we are clearly going beyond the line of cross-examination.

The Court: He asked for the date, which was testified to on direct and cross.

Mr. Cahill: If that is as far as it went, all right.

The Court: If it goes further, we will have to rule on it. I will overrule your objection and give you an exception.

A. (Continued) I would say it was in April or May of 1936.

Q. At that time were you offered a sum of money for your retirement? A. Mr. Behrens, I want to correct the

last answer. I do not believe Mr. Kenyon approached me himself; I think a lawyer representing Mr. Kenyon, Mr. Sobel, who at the time did not disclose his principal. I know it was Mr. Sobel.

Q. Did he offer you an amount of money for your retirement? A. I do not believe it was an actual formal offer, but I think he indicated an offer.

Q. Do you recall the amount? A. I think it was \$10,000.

Q. What did you tell him with reference to that offer?

Mr. Cahill: I object to that.

The Court: Sustained.

Q. Did you accept the offer?

962

Mr. Cahill: I object to that.

The Court: That is already clearly in evidence, but I will permit the answer.

A. No.

Q. What was the next offer you received?

Mr. Cahill: I object to that.

The Court: Sustained.

Q. The next day you say Mr. Kenyon or his representative did offer you \$40,000?

Mr. Cahill: I object to that.

963

The Court: Sustained.

Mr. Behrens: Your Honor, I do not like to question this—

The Court: I will hear your argument, if you think I am mistaken. I do not see the relevancy of that, but I will consider it.

Mr. Behrens: On the defendant's mental capacity, I would like to show that this defendant in May and

June, 1936, talked with these people and obtained an offer of \$10,000 and then got a higher offer, and then got it up to \$40,000.

The Court: There are limits to the extent of the work. I will let you go into the man's condition in 1936. This crime was committed in 1937, if it was committed at all. We have no evidence that he got forty. We have no evidence now that his offer is ten. I think that is within the reasonable discretion of the Court.

Mr. Behrens: All right. I have no further questions.

*Redirect examination by Mr. Cahill.*

Q. Mr. Spies, you said that you wrote to two brokers, Edward B. Smith and Kohler, Fish & Company, asking for information for the preparation of your income tax return, is that right? A. I said that I wrote these letters to two or three brokers seeking information in connection with the Federal Government—for the tax returns for the years 1936 and 1937.

Q. Were you seeking the information to prepare an income tax return at that time? A. Yes, sir.

Q. I show you two letters with the name of Murray R. Spies at the bottom, one of May 11th, addressed to Edward B. Smith & Company, and another of May 12th, both in 1938, with the name Smith, Barney & Company at the bottom, and Murray R. Spies at the top. I ask you whether the bottom one of May 11th is a letter that you wrote? A. Yes.

Q. The letter of May 12th is the one that you received? A. Yes, sir.

Q. In reply to your letter? A. Yes, sir.

Mr. Cahill: I am asking that these two letters be marked for identification as one exhibit.



Mr. Behrens: I object to any further line of interrogation with regard to these.

The Court: Wait until the question is put. I cannot rule on it in advance.

Mr. Behrens: Very well, your Honor.

(Marked Defendant's Exhibit I for Identification.)

Q. I show you a letter dated August 5, 1938, with the name of Murray R. Spies at the bottom, addressed to Kohler, Fish & Company, and a letter with the name Kohler, Fish & Company at the bottom, addressed to Murray R. Spies, dated August 8, 1938, and ask you whether the bottom one of August 5th is a copy of a letter that you wrote? 968

Mr. Behrens: I object to the question as improper redirect. All of this came out on direct examination. I asked not a single question about it. He is going back to the direct case again.

The Court: Overruled.

Q. Is that a copy of the letter that you received in reply? A. Yes, sir.

Mr. Cahill: I would like to offer Exhibit I for Identification in evidence.

Mr. Behrens: May I see it?

Mr. Cahill: Yes (handing to Mr. Behrens). May we offer the other, too? 969

(Marked Defendant's Exhibit J for Identification.)

Mr. Cahill: I offer Exhibit J for Identification also.

Mr. Behrens: I have no objection to the offer in either instance.

970

*Murray R. Spies—Defendant—Redirect.*

(Defendant's Exhibits I and J for Identification now received in evidence.)

Q. Mr. Spies, when you authorized your accountant to obtain the first extension of time within which to file your 1936 return did you have any intent to defeat and evade the income tax?

Mr. Behrens: I object to that question, to this witness testifying to the state of his own mind. That is a conclusion.

The Court: I overrule the objection.

971

A. No, sir.

The Court: The defendant is always entitled to establish his innocence.

Q. When you obtained the second extension to June 15, 1937, did you have any intent to defeat and evade the tax?

A. No, sir.

Q. When the tentative return was filed on your behalf did you have any such intent? A. No, sir.

Q. You testified that you telephoned the collector's office and spoke to a young lady in September or October of 1937. Did you have any intent at that time? A. No, sir.

972

Q. Mr. Spies, there has been testimony as to a great many letters, I believe, in connection with United Fund which bore your signature?

The Court: National Fund?

Mr. Cahill: Or National Fund. I thank your Honor for the correction.

Q. Letter apparently written and signed during 1937. Did you dictate all of those letters? A. No, sir, I did not.

Q. Who in the office frequently dictated letters?

Mr. Behrens: I object to that question as being rather vague.

The Court: I sustain the objection.

Q. Did anybody else in the office dictate letters in connection with that corporation? A. Yes, sir.

Q. Who? A. Mr. Taylor, Mr. Davis and the girl, especially when the letters were form letters.

Mr. Cahill: May I have Exhibit 7?

(Document handed to Mr. Cahill.)

Never mind that for the present.

Mr. Dennen: I can give it to you in a second.

Mr. Cahill: No, never mind.

Q. Do you recall a letter relating to the choice of a new custodian for National Fund? About when was it? A. Yes, sir, I recall some letters in that connection.

Q. Did you select the custodian? A. No, I think that was done primarily on Mr. Taylor's actions because either a friend of his or his brother-in-law was associated with the new custodian.

Q. Did Mr. Taylor work with you in the office of National Fund at the time? A. Yes, he was an employee.

Q. Was he a man of experience in that sort of work? A. I think so.

Q. He was a lawyer, was he not? A. Yes, sir.

Q. You signed the letter authorizing the selection of the new custodian. I believe it is Government's Exhibit 86. Do you recall any conferences or discussions in connection with that? A. In connection with the letter itself?

Q. The subject of the letter? A. Yes, I remember some talk in connection with it.

Q. Was there a lengthy discussion? A. No, it was a rather perfunctory matter as far as I was concerned. Mr. Taylor had arranged it.

Q. With respect to letters presented in June, 1937, between June 3rd and 4th and June 24th or 25th, were any of those brought to your home? A. I believe that any letters signed by me between those two dates were brought to my home.

Q. Who brought them? A. Either Mr. Taylor, Mr. Davis or the girl out of the office.

977 Q. Did you enter into any business discussion as to the contents of those letters? A. I do not recall any, Mr. Cahill, although it is not unlikely that there was some discussion about some of them.

Q. Did you invest some of your own money in National Fund? A. Mrs. Spies and I invested—invested a considerable amount of money in National Fund and First Mutual.

Q. She was a stockholder in one or both? A. In both.

Q. Do you remember that there was a loan made to the National Fund or there were loans made by some person or persons? A. By a bank, I believe.

Q. Do you remember what bank? A. I believe it was the Public National Bank.

Q. Did Mr. Davis or Mr. Taylor participate in the handling of those loans? A. I think he handled those almost entirely, Mr. Taylor.

978 Q. Did you rely on Mr. Taylor to take care of this situation? A. Yes, sir. They were formal matters.

Q. With respect to your presence at a meeting, for instance, on February 17 and February 18, 1937, do you have any recollection of any extended meetings at that time, any long meetings? A. No, I do not think the meetings were long, Mr. Cahill.

Q. Were the votes on the various proposals recorded after long debate or without any debate? A. Well, none of the discussions were very long, as I recall it.

Q. During the period of the early part of 1937, were you in regular daily attendance at your office in February and March and April? A. I would not call it regular, but I was there a considerable number of days.

Q. Did you go to your office? A. Yes.

Q. Did you keep any office hours or did you spend any specified hours in the office? A. No, very irregular hours.

Q. Tell us when you came in and left? A. Sometimes for one or sometimes two hours; very seldom there a full day.

Q. There has been testimony about Mr. Taylor and yourself being appointed tellers at a stockholder's meeting of National Fund, I believe, on February 18, 1937. Do you recall that? A. No, sir, except as my recollection is refreshed by the minutes. 980

Q. Were there many stockholders present, do you know? A. Probably not, not outside of our own holdings, none present.

Q. Do you know how much time the tellers took in counting the votes? A. Probably five to ten minutes at most.

Q. Do you recall a meeting in which the corporation was authorized to borrow money from you? A. I do not recall the meeting, but I recall the circumstances.

Q. Can you tell us what the circumstances were and how much time was spent on that proposition? A. Well, that was a very short discussion, as I recall. It was just a question of whether or not we would agree—this was in April, 1937, or March, 1937—if we would agree to put up \$11,000 or \$12,000 if National Fund did, and we did agree. 981

Q. Did you put the money up? A. Yes, sir.

Q. At that meeting were there discussions, any prolonged discussions? A. No, I think that was arranged in advance of the meeting, as a matter of fact.

Q. Did most of those discussions go through without discussion or with discussion? A. Almost always without discussion. They were formal matters.

Q. You were interested in Listed Securities, were you not? A. Mrs. Spies and I were substantial stockholders of First Mutual Corporation, whose purpose was to distribute the stocks of Listed Securities nationally.

Q. Who were the stockholders of Listed Securities? A. I do not believe there were any public stockholders. It never got that far.

Q. Who were the directors? A. The directors consisted of Mr. O. Glenn Saxon—

Q. Was he a New Yorker?

Mr. Behrens: I object to the line of questioning. The questions are not material to any issue here. I cannot see that it meets any point at all. We have offered the resolutions and said nothing about the number of directors. I think we have nothing in the minute book here that refers to this.

Mr. Cahill: A number of exhibits have been offered here and I objected. The point is made that they were activities of Mr. Spies. I want to show there were other persons of a reliable character interested in them.

The Court: I overrule the objection.

A. Mr. Saxon was formerly the treasurer of the State of Connecticut. He was then, I believe, or still is Professor of Business Administration at Yale University.

Q. Who were the others? A. Another was E. E. Spafford.

Q. Is that an English name, Spafford? A. He was a man of some financial experience.

Q. Who else? A. And he was a retired commander in the United States Navy, a lieutenant commander. Mr. M. W. Harrison, who was the president of the Bowery Savings Bank; Mr. Dale Parker, who was an attorney associated with Mr. R. B. Dawson, who was secretary and treasurer of the company. I believe he was also then and



still is counsel for the Medical Society of the County of New York. There was also Ted Saucier, who was at the time, I believe, was the publicity director of the Waldorf-Astoria, and who was handling the publicity for this new set-up.

Q. Do you recall a combined meeting of the stockholders, about which you have been questioned? A. Yes.

Q. You gave some testimony to the effect that a company, I believe National Fund, had an investment counsel, is that right? A. An advisory investment counsel.

Q. An advisory investment counsel. What was his function? A. His function was to advise as to what he believed the company ought to pay when buying and when selling; merely in an advisory capacity, as I recall it. It was not binding on the board of directors. 986

Q. Did that company make its purchases after receiving his advice? A. Nothing as to advice was received, I believe, except in April or May of 1937.

Q. There has been testimony offered, I think, with reference to the minutes of National Fund to the effect that at a meeting on May 7, 1937, you outlined the possibilities for the company to the directors. Do you recall that. A. I recall the minutes of the meeting, Mr. Cahill.

Q. The directors of what corporations? A. National Fund and First Mutual Corporation.

Q. Were those directors holders of large amounts of stock in National Fund? A. I do not believe so.

Q. Did they merely have qualifying shares or larger amounts? A. I do not believe they had any shares of National Fund. I do not believe that qualifying shares were necessary. 987

Q. Do you have any recollection as to the extent of the outline which gave the possibilities of the company? A. No, sir. I think that was agreed upon in advance; the enthusiasm with respect to the program was understood in advance rather than agreed upon.

Q: You have said that some of the letters were brought to your house for signature. Were any other papers brought to your house for signature in connection with the operations of the National Fund or any affiliated corporation? A. Yes, sir.

Q. When did that occur? A. Oh, during a period of my confinement, which lasted on and off between June 3rd or 4th of 1937 and August or September; nearer September.

Q. During the latter part of 1937 and continuing through that year you did give some attention to National Fund from time to time, did you not? A. In the main prior to May, 1937.

989 Q. You went into the office sometimes in that connection? A. Yes.

Q. Where was your office then? A. 40 Exchange Place.

Q. Was the office of the corporation there or just your office? A. It had a statutory office in Jersey City. The company was not engaged in selling shares. Its operations were conducted from 40 Exchange Place, I would say.

Q. You did attend some meetings of the directors from time to time? A. Yes, I did, prior to May or June of 1937, I believe.

990 Q. Did you look over some of these papers, prospectuses and agreements that have been submitted, Exhibit 100, the prospectus of Listed Securities, for instance? I am not sure that I have an accurate description of all of these; the syndicate agreement and the form of the certificates of stock, and so forth. Did you look at those papers? A. Yes, I went over them.

Q. You did assist at that time in the preparation of these papers? A. Mr. Davis was hired to do the sales and advertising. He in that capacity handled most of it. Mr. Taylor was employed to do the blue-sky work and registration, and he did almost entirely that.

Q. The registration with what body? A. The Securities and Exchange Commission.

Q. As a matter of fact I asked whether he assisted you or whether it is a fact that he drew the papers mainly. Can you tell us? A. In the main the papers were drawn by Davis and Taylor. Some of the items, however, did receive suggestions by me and corrections on some occasions.

Q. You recall June 15, 1937, Mr. Spies. Could you tell us where you were then? A. I was in bed on June 15, 1937.

Q. Do you know where Mrs. Spies was? A. She was in Chicago.

Q. Do you know when she returned? A. Somewheres I would say between the 20th and 25th of June.

Q. Would you tell us why you did not file your return on June 15, 1937? A. Well, sir, I believe I was completely confused, worried about the coronary situation. I had gotten into this program and I believe I realized that I had bitten off more than I could chew.

Q. Which program? A. This distribution program. We were still not registered with the Securities and Exchange Commission. We had a fairly large overhead. Money was going out. Money was needed to continue the program and save what was in it. Generally I was confused. As a matter of fact, I figured that any time when the figures were available and I felt better—I figured that my net worth was sufficient at any time to file the return and pay my tax. I believed that the money that I had would last forever, anyway. I felt I had done—I had notified the government with the two extensions that I was a taxpayer, and gave no consideration at all to any possibility of being a violator of the tax law.

Q. There is evidence that you signed an application for a mortgage on the house which you purchased for your family. By the way, did you sign the application? A. Mr. Cahill, I do remember that I did testify to it yesterday. I did, yes.

Mr. Cahill: May I have that application?

Mr. Behrens: Yes (handing to Mr. Cahill).

Q. Is that your signature on Exhibit 71? A. Yes, sir.

Q. I call your attention to the statement about which you have been interrogated, that your net worth on this date, on September 7, 1937, or at least that is the date of approval. The date is August 30, 1937. The approval is September 7. I call your attention to the statement that your net worth was \$40,000? A. Yes, sir.

Q. Do you believe that you possessed that much net securities at that time? A. I do, sir.

995 Q. Did you take into account in adding up the assets your investment in National Fund? A. I did.

Q. Did you expect to get that money out of National Fund? A. Yes, both that and the First Mutual Corporation.

Q. Was the house purchased with your money, Mr. Spies? A. Mr. Cahill, that raises a question in my mind. I can remember the discussion. I remember how I felt in August or September of 1937 in connection with the purchase of the house. I was reluctant to buy it, and I know I was quite ill at the time with sciatica and this nervous condition.

996 The Court: Mr. Spies, why don't you answer counsel's question. He asked whether the house was purchased with your money. That calls for nothing but yes or no.

The Witness: I was trying to go into the explanation.

The Court: I am sure you agree with your counsel. Will you consider his question?

Q. Do you have difficulty in determining whose money it is? Is that the difficulty? A. Yes, that is the difficulty.

Q. Where did the money come from? Perhaps you may cover that. A. It came directly from the annuity which was in my name, and Mrs. Spies borrowed \$4,000, the down payment on the house.

Q. Was there any other money involved in connection with that purchase or any other amount of money that you were giving to Mrs. Spies at that time? A. Mrs. Spies thought that the house should be bought and that the money that came from the annuity or the money that she received from United Sponsors on the repayment of the loan—

Q. Did you use some of your United Sponsors money for that purpose? A. We did use the United Sponsors money for the program. She felt she still had her money intact from the United Sponsors loan. 998

Q. Do you recall the closing of the purchase of that house? A. Yes, sir, I do.

Q. Did you act as your own attorney? A. I started to and then in the middle became upset and ill and took the papers up to a lawyer whom I had never seen and paid for it. He looked over the papers, and then returned to the closing.

Mr. Cahill: Have you got the minute book of National Fund?

Mr. Behrens: Yes (handing to Mr. Cahill).

Q. I ask you to look at that book, Mr. Spies, and tell us whether there was any meeting of the directors of that corporation in June, 1937? A. No, sir. 999

Q. Or in May and July? A. No, sir.

Q. August? A. No, sir.

Q. September and October? A. No, sir.

Q. November? A. No, sir.

Q. December? A. One meeting in December, on December 15th.



1000

*Murray R. Spies—Defendant—Redirect.*

Q. Did the activities of that company extend beyond November, 1937? A. Not to a great extent. They did extend beyond that.

Q. Was Mr. Taylor under a written contract with the National Fund? A. He was under a written contract to do all of the blue-sky registration work. It was either with National Fund or First Mutual. I believe it was First Mutual, for the joint program.

1001

Q. Did any doctor make any emergency call upon you or did you call for any doctor about or shortly after June 15, 1937? A. Yes, sir, in the middle of June I believe it was, after I had gotten out of bed to go to Washington. When I returned we made an emergency call to the doctor in the building at 135 Eastern Parkway. He was not available so the elevator boy went to another doctor in the neighborhood. Then in August, I believe, 1937, another emergency call to Dr. Sharpe. And then in September of 1937 an emergency call to Dr. Dickey—whose name I do not recall.

Q. What emergency; what happened? A. In each case I thought I was going to die.

Q. Did you collapse or faint? A. I was practically prostrate.

Q. When did these calls occur? A. One when I was home in bed, about June 20 some time—

1002

Q. In 1937? A. 1937. One was in August of 1937, I believe, and the other I believe was in September or October of 1937 at my home in Rockville Center.

Q. You have given some testimony about sending somewhere for forms of income tax return covering income for the year 1936, have you not? A. Yes.

Q. When did that happen? A. That was either in the fall of 1937 when the Stocker negotiations were under way, or the early part of 1938 when I wrote to the brokers.

The Court: You are going far afield on redirect. I want to give you every fair opportunity.



Mr. Cahill: May I say this: I did not have these papers on direct.

The Court: Very well, but I want you to bear in mind that there is a limit to redirect.

Mr. Cahill: I think I am going to make it a very short redirect examination.

Q. I show you two papers. One is marked "New York State" and the other marked "United States," is it? A. Yes, sir.

Q. I ask you whether you have seen those papers before? A. Yes, sir.

Q. Where did you get them? A. These were obtained, I believe, one federal form from the Custom House and the New York State form from 80 Centre Street through someone in my office whom I sent for them. I believe it was the girl in the office.

Q. You received them? A. Yes, sir, I believe so.

Q. At the time you sent for these papers, what did you intend to do? A. I intended to make out a form and send it in with a letter of explanation.

The Court: Can you fix the date of this? Has it been fixed?

Mr. Cahill: Yes.

The Witness: The latter part of 1937 or early 1938.

Mr. Cahill: I offer those in evidence.

Mr. Behrens: I have no objection.

(Marked Defendant's Exhibit K.)

The Witness: Mr. Cahill, please, I wonder if we might—Mr. Dawson is here now. I hope we can interrupt this questioning.

The Court has been very indulgent with us, but there is a very short character witness here.

The Court: Are you through with redirect?

1006

*Reed B. Dawson—For Defendant—Direct.*

Mr. Cahill: I may have a few more questions, a very few.

The Court: Mr. Behrens?

Mr. Behrens: I cannot see any point in objecting to it; if they have a character witness, I think we might as well put him on.

The Court: How long will it take?

Mr. Cahill: Possibly fifteen minutes.

The Court: You may step down and you may put Mr. Dawson on. The jury will bear with us.

(Witness temporarily excused.)

1007

REED B. DAWSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

*Direct examination by Mr. Cahill.*

Q. Are you a member of the New York Bar, Mr. Dawson?  
A. I am, sir.

Q. Do you have a law office in New York City? A. I do.

Q. Do you know the defendant, Murray R. Spies? A. Yes.

Q. How long have you known him? A. Since before 1919.

1008

Q. Where did you meet him? A. It was when I was in the office of Root, Clark, Buckner & Howland, as junior lawyer. Mr. Spies came there as an office boy and then later he was librarian for the law firm.

Q. Did he subsequently go with you when you left that office? A. When I left that office Mr. Spies, at my request, went with me and became my secretary.

Q. Did you subsequently in any way have anything to do with him studying law? A. Yes, I did. He had left my employ after, I think, six months or possibly longer and

went to Florida and came back and asked if he could have his job back as my secretary. I told him that he could not, that in my opinion there was no real opportunity in a law office for a male stenographer, and I thought he had ability and he should get a degree and be admitted to the practice of law.

Q. Did he then become a lawyer? A. Yes, he went to law school and became admitted to practice.

Q. Did he go with you again? A. He was with me all the time while he was studying.

Q. Or remained with you for some time? A. Well, he remained with me until about 1932, I believe.

Q. Did he then go out to practice for himself? A. He did, yes, sir. 1010

Q. Have you been in touch with him since that time? A. Yes, I would say all of that time, although at rather infrequent intervals from perhaps 1932 until the end of 1936 or the beginning of 1937. I would see him actually perhaps once or twice a month.

Q. Did you see him in 1937? A. Yes, more frequently.

Q. Can you tell us how he acted at that time, the physical evidences that you observed? A. He acted like a sick man to me in a great many respects.

Q. Physically what did he do? A. He was very jumpy, very nervous. He would reach his heart this way (indicating), and apparently very much concerned about his personal health.

Q. Was he doing some work for you at that time? A. 1011 No, he was not. I became later on secretary and treasurer of this Listed Securities Corporation, which never really functioned. But Mr. Spies brought that matter to Mr. Barker and to me. From the time that he brought that to me and for a considerable time thereafter I saw a great deal of Mr. Spies, for almost—monthly or weekly, since that time, from late 1936 or early 1937.

1012

*Reed B. Dawson—For Defendant—Direct—Cross.*

Q. When he was in your office did he have—did he act for you or over any accounts? A. For the entire time, I believe, that he was in my employ he had a power of attorney over my personal bank account and my clients' bank accounts.

Q. Do you know a number of other people who know him? A. A great many, yes, sir.

Q. Do you know what his reputation is among them for honesty and truthfulness? A. Very high.

Mr. Cahill: I think that is all.

1013

*Cross-examination by Mr. Behrens.*

Q. When Mr. Spies came to you in 1936, in the latter part of 1936 or early 1937, and offered you this proposition to go with Listed Securities, was it your opinion that this man was insane? A. Of course not.

Q. During this particular period was it your opinion that he was crazy? A. I am not a psychiatrist.

Mr. Cahill: It has never been claimed that he was insane. I think that is irrelevant.

The Court: Yes. I won't allow you to continue on that.

1014

Q. During 1937, Mr. Dawson, would you question anything that Mr. Spies told you or would you accept it as true? A. So far as I know I have never questioned anything Mr. Spies told me. As a matter of fact, we were discussing things, something of that sort.

Q. Would you say that you had complete trust and faith in him throughout this entire period you knew him? A. I should say so, yes, sir.

Q. With reference to Listed Securities, would you say you discussed the prospect of this venture with him on several occasions in 1937? A. I did not very much, sir, no.

Mr. Parker, who had been a partner of Samuels & Company in London, he had a banking mind and had banking experience, had most of the discussions. It was through him that the board of directors were brought together. They were brokers associated with the staff of Mr. Saxon, who was my friend.

Q. You were brought into the program by Mr. Saxon?

A. Yes.

Q. Will you tell us when you entered Listed Securities?

A. I do not recollect, sir. It was either, I should say—wait a minute. I moved to Rockefeller in May of 1937, so it was after that. I would say that it probably—I know that it was discussed with Mr. Parker and Mr. Spies and before May of 1937. Whatever active work that I did in the picture, I think, was after May, but it may have been as early as the beginning of 1937, when this was first talked about. But it was understood that we were going ahead with it. I do not just exactly recall. It was between, certainly, December of 1936 and May of 1937.

1016

Q. Will you tell us what the program was that was spoken of by Mr. Spies at that time? A. As I recall it, the idea was to create as quick as possible a perfectly equitable so-called foolproof investment trust where the funds could not be tampered with and all that sort of thing, and the general idea spoken about was to distribute these securities through a national distributing company, in which neither I nor Mr. Parker was financially interested. But Mr. Spies would have the distributing program for a certain definite company, as set forth in the prospectus.

1017

Q. What time was it anticipated that it would take to get this program under way? A. I do not recall. I do recall that we—when I say “we” I mean Mr. Parker and myself—to deal in Listed Securities as distinguished from a sales company. We were very much disappointed and annoyed by the delays that went on throughout the summer of 1937 to such an extent that shortly thereafter this I resigned because the program had not been carried forward.



1018

*Reed B. Dawson—For Defendant—Cross.*

The Court: We won't go into the operation of the business any further. We do not want to try that case, if there was a case. If you want to go into the condition of Mr. Spies' mind as this witness knew it, you may proceed further.

Mr. Behrens: I have one question with respect to the issues.

Q. Do you recall that the application for registration before the Securities and Exchange Commission was made in May and granted in August, 1937? A. I think that is correct.

1019

Q. Is that the delay to which you referred? A. That was one of the delays. I believe there was only one whole-sale organization in the whole country that was interested in this situation while the Securities and Exchange Commission application was pending. At the time I was told that other dealers were being drawn into the group.

Q. Who told you that? A. Mr. Spies and Mr. Taylor and the officers of the company.

Mr. Behrens: That is all.

The Witness: Not a misrepresentation but merely that that was the program.

Mr. Cahill: That is all.

The Court: We will now take a recess until 2:15 P. M.

1020

(Recess until 2:15 P. M.)



## AFTERNOON SESSION. 2.15 P. M.

MURRAY R. SPIES resumed the stand.

*Redirect examination (continued) by Mr. Cahill.*

Q. I show you a letter addressed to Murray R. Spies, dated October 1, 1936, and ask you whether you received that letter? A. I did, sir.

Mr. Cahill: I offer that in evidence. Is it in evidence?

Mr. Behrens: It is probably marked for identification. I have no objection to that, either, your Honor. 1022

The Court: Very well.

(Government's Exhibit 51 for Identification now received in evidence and marked Defendant's Exhibit L.)

Q. Was the \$2,428.42 mentioned in the letter the final payment on the loan of Mrs. Spies to the United Sponsors?

A. Yes, sir.

Q. And was the note given for that loan, the note of \$8,440, mentioned here? A. Yes, sir.

Q. You have referred, Mr. Spies, to the employment of Mr. Taylor as the associate counsel of the National Fund Corporation on your cross-examination. Do you recall that? A. Yes, sir.

Q. I show you a letter dated May 6, 1937, addressed to Mr. S. J. Taylor, copy of a letter, rather, with the name of the First Mutual Corporation at the bottom, and ask you whether you have seen that before? A. I have. 1023

Q. Is that Mr. Taylor's signature on the bottom? A. It is, and his initials are on each page.

Q. That is a copy that was written by whom? A. That was a duplicate original. I think it was executed in three copies. This is one of the duplicate originals.

1024

*Murray R. Spies—Defendant—Redirect.*

Q. Is that the agreement with Mr. Taylor to which you referred on your cross-examination? A. Yes, sir.

Mr. Cahill: I will offer that in evidence (handing to Mr. Behrens).

Mr. Behrens: I have no objection to it, either, your Honor.

(Marked Defendant's Exhibit M.)

1025 Q. I show you Government's Exhibit 104, Mr. Spies. What do you call that? Is that the prospectus? A. No, that is just a pamphlet describing the growth in the United States.

Q. Was that Listed Securities? A. Listed Securities, First Mutual Corporation, in connection with the proposed sales of Listed Securities.

Q. I show you another document and ask you whether that is a copy of the same thing? A. That is the printer's proof from which that was prepared (indicating).

Q. From which Exhibit 104 was prepared? A. Yes, sir.

Mr. Cahill: I will have that marked for identification so we can distinguish it.

(Marked Defendant's Exhibit N for Identification.)

1026 Q. I call your attention to some notations on this proof, apparently written in lead pencil, and ask you in whose handwriting that is, those notations in the margins between the lines? A. I believe they are all Mr. Davis'.

Q. Are any of them in your handwriting? A. I do not believe so.

Q. Did Mr. Davis go over the proof before the document was sent to the printer? A. That was the document that he, I believe, prepared almost entirely.

Q. You looked at this some time or other? A. That I do not recall.

Q. You do not recall? A. No.

Mr. Cahill: I offer it in evidence.

Mr. Behrens: I object to this, as to its materiality, as to whether someone drew it.

The Court: The question is whether the defendant or somebody else actually drew this document? I will allow it.

(Defendant's Exhibit N for Identification now received in evidence.)

Q. I call your attention to Government's Exhibit 61, Mr. Spies, a photostatic copy of the Metropolitan Life Insurance application, and I direct your attention to the question: "Have you had epilepsy fits, vertigo and dizziness," and so on, "Heart or kidneys." I direct your attention to the answer in June, 1932: "Some doctors say yes and some say no." A. Yes, sir.

Q. Did you make that statement to the doctor who examined you at that time? A. I believe I did.

Q. Did you tell him that physicians and doctors had determined whether you had a heart disease or not? A. Yes, sir.

Q. Your answer was as given here, substantially? A. Yes, sir.

Q. "Some doctors say yes and some say no." I direct your attention to Government's Exhibit 60, the New York Life Insurance Company application, specifically to your answer to Question 8B, "The heart blood vessels, or lungs," and your answer "No," to that. Do you recall making specifically that answer to the doctor at that time? If you have no recollection, just tell me. A. No, sir, I have no recollection.

Q. I call your attention to SB on Exhibit 63, the New York Life Insurance Company to the answer after the question about heart, lungs and something else (handing witness)? A. No, sir, I believe—I have no definite recollection of the answer.

Q. Do you remember discussing Dr. Gilman with the doctor who was examining you for the life insurance company? A. I have a recollection of that, yes, sir.

Q. You have mentioned Dr. Gilman's name at some time in the course of these applications, have you not? A. Yes, sir, I have.

1031 Q. Without going into all of those applications one by one, Mr. Spies, will you tell us when you answered the questions with respect to disease of the heart or blood vessels did you base your answers on your own opinion or on what the doctors told you?

Mr. Behrens: I object to that question on the ground that it is, first of all, too inclusive and it also includes some applications where the witness specifically said he did not make the answers put down. If he will limit his question to any testimony here or to the things that the witness will assume are correctly reflected, I will have no objection.

Mr. Cahill: I will take them up one by one.

The Court: I will permit the general question as to whether there were some instances.

The Witness: May I have the question again?

Q. (Read.) A. I would say in some instances on what the doctors said and in some instances on my own opinion.

Q. Mr. Spies, have you seen checks to Mr. Hillyer by Mrs. Spies in connection with the United Sponsors note?

A. I have, sir.

Q. Have you had them here at the trial? A. Yes, sir.

Q. Do you know where they are for the moment? A. Not for the moment.

Q. Have you searched for them during the recess? A. Yes, sir.

Q. Can you tell us how many checks of that kind there were and to whose order?

Mr. Behrens: The checks would be the best evidence.

Mr. Cahill: I haven't got them.

Mr. Behrens: I don't have them either.

The Court: I would not mind so much that, but I think it is pretty remote redirect examination, Mr. Cahill. I do not want to cut you off.

Mr. Cahill: It is directly in connection with the cross-examination.

1034

The Court: Cross-examination?

Mr. Cahill: Yes, in which an attempt was made to show that the United Sponsors money was income during 1936, whereas we contend that it was a loan by Mrs. Spies out of her funds and that these amounts were repayments.

The Court: I will overrule the objection. Proceed.

A. I believe that there were 10 or 11 checks from Mrs. Spies to Mr. Hillyer. Each time she received the full amount of the payment from United Sponsors on that loan she, in turn, would issue a check to Mr. Hillyer for his proportionate share of the note.

Mr. Cahill: I think that is all.

1035

Mr. Behrens: I would like to offer so much of Government's Exhibit 89 for Identification which is the minute book of National Fund, Inc., which contains the minutes from February 17, 1937, to December, 1937, to which this witness has referred particularly on his redirect examination.

The Court: For what purpose?

Mr. Behrens: For the purpose of having before the jury actually what the minute book shows transpired

at the meetings in order that it may test the credibility of this witness, who says that the meetings were rather perfunctory.

Mr. Cahill: The answer to that——

The Court: I will let in any minutes of meetings at which he was present.

Mr. Behrens: He was present at all meetings in 1937.

Mr. Cahill: The latter part of 1937 there were no meetings whatever except one in November or December.

The Court: Then the minute book won't disclose any such meetings.

1037

Mr. Cahill: No. With respect to the rest then it is conceded that he was present anyway, but they may or may not be accurate. I do not question that these are the minutes. I do not want necessarily the argument to be here as to the extent of the discussions or activities as to which we have no evidence.

Mr. Behrens: I believe the witness has said they are substantially correct.

The Court: My answer to that is that regardless of the fact I will let them in with respect to any minutes at which he testified he was present. If you tell me that he has testified to all of these minutes, I will let the book in.

1038

Mr. Behrens: Certainly I am only offering so much of the minutes as concededly took place on February 17, 1937, to the end, to the end of December, 1937, because at all of those meetings the board of directors, for instance, are present.

The Court: Very well.

Mr. Cahill: Exception.

(Government's Exhibit 89 for Identification now received in evidence.)



*F. V. Widger—For Defendant—Direct—Cross—Redirect. 2039*

Mr. Behrens: No further questions.

Mr. Cahill: That is all.

(Witness excused.)

FRANK V. WIDGER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

*Direct examination by Mr. Cahill.*

Q. Mr. Widger, do you know the defendant, Murray R. Spies? A. I do.

Q. How long have you known him? A. About eleven 1040 years.

Q. Do you know other people who know him in the community in which he lives? A. Oh, yes.

Q. Do you know his reputation in the opinion of those people for honesty and truthfulness? A. Yes.

Q. What is it? A. Very high.

Mr. Cahill: Your witness.

*Cross-examination by Mr. Behrens.*

Q. I did not get your address, sir? Where do you live?  
A. 77 Union Place, Lynbrook, Long Island.

Mr. Behrens: Thank you.

1041

Mr. Cahill: Just one question I forgot to ask.

*Redirect examination by Mr. Cahill.*

Q. You are not associated in business with the defendant, are you? A. No, sir.

Q. What business are you in? A. I am with the Texas Company, manager of sales.

1042 *Dr. Nathaniel A. Rosen—For Defendant—Direct.*

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Mr. Cahill: All right, sir.

(Witness excused.)

Mr. Cahill: With regard to the testimony of Dr. Rosen—

Mr. Behrens: Due to the inability of Dr. Rosen, whom the defendant would like to call as a witness, I have agreed to stipulate that the doctor's testimony taken at the last trial may be read here with the same force and effect as if he were called to testify.

The Court: All right. Whose witness was he?

Mr. Behrens: Defendant's witness.

(To the reporter): Did you take the testimony of Dr. Rosen at the last trial?

1043

The Reporter: Yes, sir.

Mr. Behrens: Suppose we have the reporter read it.

(The testimony of Dr. Nathaniel A. Rosen, taken at the previous trial, May 1, 1941, is spread upon the record and the following is a copy thereof.)

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"DR. NATHANIEL A. ROSEN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

*"Direct examination by Mr. Cahill.*

1044

"Q. You are a doctor of medicine, licensed to practice medicine in the State of New York, are you? A. Yes, sir.

"Q. Where is your office? A. 85 Eastern Parkway, Brooklyn.

"Q. Were you practicing there in 1937? A. Yes, sir.

"Q. Do you know the defendant, Murray R. Spies? A. Yes, sir.

"Q. Did you get a call to his house in June, 1937? A. Yes, sir.

"Q. Would you tell us about the call, the nature of the call, and what happened when you saw him? A. It was, I think, just after midnight. I know I was asleep and the bell rung and somebody banged at the door and I got up and went to the door. Tommy, the doorman from Turner Towers, 135 Eastern Parkway, an apartment house removed from where I lived, said, 'Hurry, doctor, there is a man dying at Turner Towers with a heart attack.'

"The Court: We do not want that. You were called there by the doorman?

"The Witness: Yes.

"Q. You went to the Turner Towers? A. Yes.

1046

"Q. When you got there what happened? Did you go to the apartment of Mr. Spies? A. Yes, sir.

"Q. What happened there? A. I found a man who was pale from anxiety and with a cold perspiration on his forehead and moaning, and I proceeded to examine him. His wife said that it was his heart. I examined the heart by the usual means that we employ to determine whether there is in fact any disturbance or disease in the heart, and having done so I found out that there was nothing wrong with his heart, to the best of my knowledge.

"Q. Did he say anything to you during the examination? A. Very little. I remember I said to him, 'You think you are dying. You are very frightened,' and he sort of acquiesced and was hopeful that I would not find—

1047

"Q. What did he say? A. He said very little. I do not recall exactly what he said. All I recall is my impression of the reaction.

"Q. State the substance, if you do not remember the exact words? A. I do not recall the nature of what he said.

"Q. Did you treat him? A. Yes, I did. I gave him an injection of morphine and atropine by hypodermic.

"Q. What condition did you find there, what did you find he was suffering from at the time? A. My diagnosis was acute anxiety neurosis.

"Q. Did you treat him after that? A. Yes.

"Q. How many times? A. I treated him for several months thereafter.

"Q. Did you find his condition substantially the same on those occasions? A. No, I found his condition somewhat improved.

"Q. Did he talk to you at any time about his fears? A. Oh, yes. That was one of the salient features of the case. Before I could——

"Mr. Whearty: I move to strike it out.

"The Court: Strike it out. The jury may disregard it.

"Mr. Cahill: What did he say?

"The Court: You asked him a question and he did not answer it.

"Mr. Cahill: We will go on.

"The Court: You asked him about his fears.

"Q. Was any expression of his fears made by him to you? A. Yes.

"Q. What did he say? A. He said that he was afraid that he was going to drop dead, that this was a heart attack. I said 'A heart attack is usually described as a coronary thrombosis, where a man might get in a position where the patient drops dead.' He understood that fully. I proceeded to prove to him that he should not have fear by sending him to the Prospect Heights Hospital and having certain work done on him which would disprove conclusively—disprove the presence of such heart disease as would cause him to drop dead.

"Q. Were the results of the examinations of the Prospect Heights Hospital given to you? A. Yes.

"Q. Did you take those as part of the history of his case?

A. Part of the physical examination of his case.

"Q. I show you Defendant's Exhibit P and ask you whether those are the records of the examination at the Prospect Heights Hospital to which you have just referred?

A. Yes. Those are tests that I had done there.

"Q. You had a blood examination made? A. Yes.

"Q. And a urine examination? A. Yes.

"Q. Did you have heart tests made—without going into the details? A. Yes.

"Q. Did you treat him after you received that report from the Prospect Heights Hospital? A. I did.

"Q. After the report came from the Prospect Heights Hospital that you testified about, did you treat Mr. Spies further? A. I did.

"Q. Did you examine him on numerous occasions? A. Yes, sir.

"Q. Did he talk to you any further about his fears? A. He constantly talked to me about his great anxiety concerning his impending death. He talked to me about that up through to the last time I saw him which was, I think, about August or September of that year, and he moved out of the neighborhood.

"Q. This began in June, 1937? A. Yes, sir.

"Q. As the result of these various examinations and treatments what diagnosis did you make as to the defendant's condition physically? A. I made a diagnosis of acute anxiety neurosis.

"Q. Will you explain to us just what that disease is? A. Yes.

"Q. What the cause of it is and what the attacks are? A. Yes. It has been established that certain psychological changes, certain fears and attitudes and patterns of thought even back to our earliest childhood can cause certain difficulties in both our physical wellbeing and our behavior.

As far as the physical effect of certain thoughts, I think it is quite apparent that if anybody has a psychological reaction like fright, that that physical reaction is an attitude of protection, and the color of the face actually gets white, showing a contraction of the blood vessels and certain physical phenomenon accompany certain psychological reactions. If the physical phenomenon of a certain psychological reaction brings about a patient's condition, a sudden stopping of the heart or in the region of the heart the patient will have an actual pain around the heart, an actual disturbance of the rate and rhythm and various other physical characteristics of the heart action.

1055

"If the patient gets into his mind that he has a cancer, he will actually vomit and lose weight and not be able to eat. That physical reaction as to cancer, that psychological disturbance can actually cause a patient to go blind and be paralyzed.

"We all know about Saint Anne de Beaupre.

"Mr. Whearty: I object.

"The Court: Sustained. Get down to this man.

"Q. Get down to the case of this particular patient, Mr. Spies. What was the effect on the physical phenomenon that you observed in his case? A. His heart.

"Q. Was the action normal? A. Very rapid.

1056

"Q. What about the blood pressure? A. Slightly higher than normal.

"Q. Were there any other changes with respect to metabolism or anything of that sort? A. He was constantly—sweat was one of the symptoms that he possessed. His hands were always wet and clammy and he lost an unusual amount of moisture and if the condition lasted and continued he would get cold and his whole face would be covered with cold perspiration.

"Q. With respect to the power of concentration and application to his work in daily affairs, would that have any



*Dr. Nathaniel A. Rosen—For Defendant—Direct—Cross.* 1057

effect, that disease? A. Well, in my opinion it would have a very definite effect on his daily behavior.

"Q. Insofar as your observations went, did it have? A. It did.

"Q. Would you state to us, please, what qualities or characteristics he showed in that respect or any other, including any manifestations of that sort? A. He paid the Prospect Heights Hospital with a check that bounced and I was called in there and there was a to-do about it. He was very delinquent as to my checks, in paying me, showing that he did not understand the disturbance and what it was. I would have objected to treating him altogether.

"Q. Would a disease of that sort, in your judgment, produce a neglect of ordinary business affairs? A. Yes, definitely. 1058

"Q. Would it have as one of its consequences a tendency to procrastinate? A. Yes, it would. The attitude would be, what difference does it make? I am going to die anyway.

"Mr. Cahill: I think that is all.

*"Cross-examination by Mr. Whearty.*

"Q. Doctor, how long have you been practicing? A. Since 1927.

"Q. What specific time did you treat Spies? A. June, 1937, until about September, 1937.

"Q. June to September. Do you have any records there which indicate the date in September? A. If you have a moment's patience I think I can find out. 1059

"Q. I have all the patience in the world, doctor. A. The exact date of his last visit?

"Q. I just want to establish the dates? A. It looks to me as it was September 26th or possibly a week—within a week of September 26th. I think that is about as accurate as I

1060 *Dr. Nathaniel A. Rosen—For Defendant—Cross.*

have it. The last paid visit was on September 26th, according to my record.

"Q. Was it at that period that Spies failed to pay his bills? A. It was that period or all the time I was trying to have him finally pay it. I do not want to leave any false impression.

"Q. Neither do I. Doctor, did you have any conversation during that period—understand that I have a serious reason for asking you this—did you have any conversation with Spies during that period about paying your fees? A. Several times.

1061 "Q. Did Mr. Spies give you any reason for not paying your fees? A. He told me that he is short now, he is going to have money, he is going into some stock advising company, or something like that. I remember once he sent me a prospectus of some new business that he was going into; if you wanted to buy stock you could be advised by him, something to that effect. At that time he was very poor or he lost a lot of money or something to that effect—he was losing money, I am sure.

"Q. Did Spies discuss his business with you at all? A. Only about the idea that he was going to be a stock-buying adviser, some such business. Other than that I did not know anything about what business he was in.

1062 "Q. Have you a record in your book of the exact date on which you called on this midnight visit? A. I have a record here of the first date in my office. That midnight visit, it was an outside call. I did not make any record of it.

"Q. What was the date of his first visit to your office? A. Tuesday, June 29, 1937.

"Q. And in those three or four months, June, July, August and September—four months, actually how many visits did he make to your office? A. I can tell you exactly on that.

"Q. If it is not too much trouble, doctor. A. No. Exactly 13 visits.

"Q. Did Mr. Spies on any one or more of these visits tell you that he was under any pressure in connection with his business, that he was very busy or otherwise? A. I do not recall.

"Q. Did he tell you that part of his nervousness was caused by the pressure of his business? A. No, I do not think so.

"Q. He did not? A. That is my impression.

"Q. When you say impression, is that your best memory, you mean? A. The reason I say that is because if a man could be both conscious enough of his—

"Q. Just a minute. I asked you did he say it? A. I do not recall his saying anything about that.

"Q. First of all, on the occasion of all of those 13 visits, would you say that on all 13 visits that Mr. Spies was incapable of being present in your office? A. Incapable? He was in my office.

"Q. So that is out. Would you say that on all of those 13 occasions, that on all of them he was so incompetent that he was not mentally and physically qualified to fill out an income tax return? A. Whether he had enough experience to fill out an income tax return?

"Q. Whether he was competent to act on each or all of these 13 visits to your office? A. When you say competent mentally, was he mentally in a position so that he could positively write it out?

"Q. What I mean is was he able to sit down and intelligently, in a condition where he could sit down and understand what he is doing, write in in answer to the word salary, so much; interest, so much; deductions, so much, and then sign his name to it? Go through the simple procedure of making out an income tax return? A. I think he could do it.

"Q. Based on your treatment of that man over a period of four months, would you say that he at some period within those four months, at least he was likewise capable of

1066 *Dr. Nathaniel A. Rosen—For Defendant—Cross—Redirect.*

making out an income tax return and knowing what he was doing? A. I think he was capable of even reading Plato's reasons.

"Q. You say you found absolutely nothing wrong with his heart, nothing organically wrong? A. That is it.

"Q. But functionally he had a slight murmur? A. I did not find that murmur.

"Q. You said his blood pressure was just slightly higher than normal? A. Yes.

"Mr. Whearty: Doctor, I think that is all I wish to ask you. Have you any questions, Mr. Cahill?

1067 *Redirect examination by Mr. Cahill.*

"Q. I presume that you have no special knowledge of the Income Tax Law or the requirements for filling out a return? A. Your presumption is correct.

"Q. You would not be able to say whether it would be simple or complex or not? A. I never filled one out myself.

"Q. Did you find any evidence of what they call shingles? A. Yes, I did.

"Q. Is that of a nervous origin? A. Yes.

"Q. Did Mr. Spies ever talk to you about life insurance rejections? A. Yes.

1068 "Q. What did he say about that subject? A. He tried to convince me on that by pointing out that he had been rejected repeatedly, that there was something wrong with his heart, and that I was crazy.

"Q. What did you say to him? A. I could not find out the things on my examinations that could substantially cause such a diagnosis.

"Q. Did he tell you whether he was worried by those rejections by the insurance companies, the life insurance companies? A. Of course he was.

"Q. Did he tell you that? A. He told me so. That was his big proof.

*Dr. N. A. Rosen—For Defendant—Redirect—Recross.* 1069

"Q. Did he talk to you on any occasion about the needs of his family? A. That I do not recall.

"Mr. Cahill: I guess that is all.

"Mr. Whearty: There is just one question, doctor.

*"Recross-examination by Mr. Whearty.*

"Q. During this period was Mr. Spies incompetent to physically hand over to an accountant his books and papers, just as I am handing that batch on that shelf there, and say to the accountant, 'Here is the material. I want you to get my income tax return so I can sign it.' A. No.

"Q. He was not competent to do that, was he? A. No. 1070

"Mr. Whearty: That is all.

*"By Mr. Cahill.*

"Q. If the various materials on which the report depended had to be assembled from various places, would you say that the trouble from which he was suffering would impede him in getting those materials together? A. Yes, I would.

"Mr. Cahill: That is all, doctor.

"Mr. Whearty: That is all, doctor."

(Witness excused.)

Mr. Cahill: Is Dr. Sharpe here?

(No response.)

1071

I have one more witness to testify. He has been here several times. I am told that he is on his way. This is my only witness.

The Court: We will take a recess for five minutes.

(Short recess.)

1072

*Dr. Charles T. Sharpe—For Defendant—Direct.*

DR. CHARLES T. SHARPE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

*Direct examination by Mr. Cahill.*

Q. Doctor, are you a physician duly licensed to practice medicine in the State of New York? A. I am.

Q. How long have you been admitted to practice? A. In the State of New York since 1912.

Q. Prior to that time had you been admitted in any other State? A. Canada, in 1898.

Q. You have been practicing in New York since 1912? A. Yes.

1073

Q. Do you know the defendant, Murray R. Spies? A. I do.

Q. Have you treated him? A. I have.

Q. During what years? A. I saw him first in January, 1935.

Q. Where? A. At an emergency call at his office. I think it was probably 27 William or 40 Exchange Place, one of those places. It is the same building, I believe.

Q. In what condition did you find him and what did you do for him? A. He was suffering very markedly, a nervous condition, neurasthenia, psychoneurasthenia or psychoneurosis, if you like. The reason he gave me at the time for his trouble was that he had been told that he had a heart condition, and the type of heart condition that had been reported was one that is very fatal. It is one that a man does not often recover from and bears with it a great deal of anxiety, and so on.

1074

Q. Do you treat him? A. I did.

Q. Did you see him after that, doctor? A. Yes.

Q. When? A. I saw him again in June, 1936.

Q. Can you give us the date of that visit? A. June 8, 1936.

Q. Did he tell you about any business that he was expecting to conclude? A. I have a note here that he said



he felt nervous, all agitated. He was in a psychoneurotic condition at the time, and he could not concentrate. He was so extremely nervous that he had difficulty in concluding his thoughts, and he was very, very much agitated. He was afraid to go through with it without some help.

Q. Did you treat him? A. Yes.

Q. Did you give him any advice with respect to going through with this transaction? A. I do not recall that I did. What I was interested in was the physical condition. I do not know that I volunteered any information as to whether or not he could go on with the proposition.

Q. When did you treat him after that? A. I saw him again August 9.

Q. In the same year? A. In 1937, the same address, and the conditions were almost identical.

Q. Did he tell you anything on any of those occasions about his fears? A. Yes, that was the outstanding picture of his illness, his fears. It was the most important subject, the symptom that was obtained.

Q. Did he speak about his fears to you, the nature of them at all? A. Yes. One was that he had been refused insurance and that he was afraid he was going to die and he was afraid he might lose his mind.

Q. What treatment did you give him? Medication or some other treatment? A. I thought the best thing for him was a book that I had read about that time, a book that was published—rather written by a Dr. Oliver. The title of the book is "Fear". I recommended the book for his reading and provided him with a copy and I also reassured him that medically he was in good physical condition, that as regards the blood pressure and pulse, that he should not fear any immediate death, and that if he could get as much benefit out of this book as some of my other patients had I thought he might get along and be able to carry on.

Q. Did he report to you subsequently that he had read the book? A. Yes.

Q. Did he seem to improve in condition? A. Well, I saw him again on April 8th and he was in very much the same condition as before. I loaned him the book on August 9, 1937, and I saw him on April 8, 1938. He was in then for a checkup and came to my office this time. Still he had not got hold of himself. He was still nervous and fearful, and it took some time to get him to shake out of it.

Q. What physical symptoms did he have? A. Trembly, jitteriness, and he was blanch and in a state of prostration, the typical symptoms of one suffering from fear.

1079 Q. Can you tell us from your experience whether those fears were of the nerves or of some other origin? A. They were mental, I take it, from some experience that he had had, possibly the aggravation of the original experience of being turned down by the insurance company and told that he would not live long.

Q. From your experience, doctor, would you diagnose his trouble and tell us what he was suffering from? A. There are about three or four names attached to it, psychoneurosis, psychoneurasthenia, and I heard you mention and speak of neurocirculatory asthenia. All of them mean very much the same thing, but possibly a little difference in diagnosis.

1080 Q. In terms as clearly as you can define for us what they mean? A. Extreme nervousness, agitation, anxiousness, worry, sometimes depressed and almost poisoned by this mental condition of fear so that the internal glands do not function, do not synchronize and function; some are working in excess and some are not active enough.

Q. Would you say that a man in the condition in which he was suffering from, that is, from which he was suffering, would you say that he would be capable of doing a great amount of work?

Mr. Behrens: I do not know that this doctor is qualified as an expert witness in the psychiatric or

neurological fields. At this point we are departing from a recital of the doctor's experience with the defendant and now getting into the field of expert testimony. I should like to determine whether this doctor is a psychiatrist.

Mr. Cahill: I do not know whether he specializes in that or not, but I will ask a few questions.

The Court: Regardless of that, I think it would be better for you to ask the witness what this defendant could or could not do, rather than what someone else could or could not do.

Q. Would this defendant be capable of doing a great deal of work? A. He might be capable of doing a great deal of work provided one of two things did not happen: If he came up against one of his inhibitions or one of his obsessions that might spring up, he might then revert immediately to this state of fear and anxiety which he had experienced on many occasions. 1082

Q. Would you say that the defendant's will power, his will to do things, would be affected? A. Absolutely. A man in that condition, he is just paralyzed.

Q. Do you mean to say, doctor, that he was in a state of paralysis at times, suffering from it? A. Yes. If he ran up against one of his inhibitions he will go back over the old chain and suffer again from anxiety and fear.

Q. Would you say that the defendant in that condition would have any tendency to procrastinate? A. Procrastination is one of the characteristic features. He might be perfectly well and carry on and do a piece of work and if that work opens up again these inhibitions or these obsessions, he will, as I say, spring the trap again, he will be back on his old trouble. 1083

Q. Even if intellectually capable of doing something, would his will to do it be affected? A. That might easily

1084 *Dr. Charles T. Sharpe—For Defendant—Direct—Cross.*

be. It would be that he was suffering from that condition of fear at the time being.

Q. Do you have a copy of that book with you, doctor?

A. Yes.

Q. Did that book deal with one suffering from similar fears? A. A man named Edwards was examined for insurance and he was——

Mr. Behrens: Is that fact or fiction, your Honor?

The Court: Whether fact or fiction, it certainly is not evidence in this case.

Mr. Behrens: I object to any questions along that line.

1085

The Court: I sustain the objection.

Mr. Cahill: I except. I want to show the form of treatment and the resulting troubles from which he suffered.

The Court: You might ask it in another form, but I am not going to have him read the book before the jury.

Mr. Cahill: To read the book or the treatment——

The Court: That is, I am not going to have the book detailed before the jury.

Mr. Cahill: I respectfully except. I will go no further, if that is your Honor's definite ruling.

1086 Q. This psychic condition, the psychoneurosis that you testified about, is it or is it not insanity? A. That is not insanity.

Mr. Cahill: I think that is all.

*Cross-examination by Mr. Behrens.*

Q. Is this disease one of great rarity? A. No.

Q. Do doctors come upon it quite frequently in practice? A. Yes.

Q. I believe you said the first time you saw Mr. Spies was in January, 1935? A. Yes.

Q. And at that time he complained about a heart condition which you characterized and said might cause him to drop dead at any time? A. No, I did not.

Q. I am sorry if I have misunderstood your answer. A. It was the insurance doctor that he had been examined by that was in error.

Q. I thought that was your diagnosis? A. No.

Q. My question is this: What was the disease he claimed the insurance doctors told him he had? A. Coronary thrombosis.

Q. That is in January of 1935? A. I believe so. I am not sure of the date. 1088

Q. The next time you saw him was on June 8, 1936? A. Yes.

Q. Would you be able to know anything about his condition in the interim? A. Only in so far as experience teaches what is going to happen and what in 99 times out of 100 does happen under the circumstances of that condition.

Q. This condition, as I understand it, is a varying condition? It is not a steady state, I mean? A. It is like this (indicating).

Q. Peaks and valleys? A. Yes.

Q. The time after that that you saw him, doctor, was on August 9, 1937? 1089

The Court: You mentioned June, 1936?

Mr. Behrens: I thought I had mentioned that.

The Witness: January, 1935.

Q. June 8, 1938? A. Yes.

Q. And then I think August 9, 1937? A. Right.

Q. Then April— A. March 18, 1938.

Q. I missed that one. March 18, 1938? A. Yes.



1090 *Dr. Charles T. Sharpe—For Defendant—Cross—Redirect.*

Q. Then you saw him on April 8, 1938? A. Yes.

Q. And after that on July 25, 1938? A. May 3, 1939, and June 1, 1939.

Q. Have you examined him recently, doctor? A. No.

Q. Would you tell us once more what the symptoms are of this neurocirculatory asthenia? A. Cold sweats, fear, trembling, pains frequently about the heart, dizziness, vertigo, spots before the eyes, disturbances of the digestive functions of the gastro-intestinal tract. Any part of the body may be involved. That is the difficulty of this condition, and the symptoms vary from time to time, sometimes one tract may be involved and sometimes another.

1091 Q. Those symptoms come to make mental disorders? A. They are common to one suffering from fear, very common.

Q. When you say "fear", would that cover any type of fear, anxiety for one's personal well-being, anxiety over taking examinations or anxiety over almost anything? A. You remember your exams, don't you?

Mr. Behrens: I do, yes, sir.

I think that is all, doctor.

Mr. Cahill: Just one point that I would like to clear up.

*Redirect examination by Mr. Cahill.*

1092 Q. With respect to the reference to this coronary disease, at least the defendant's reference to it, do you find anything on your cards that would enable you to fix the date of that? A. No, I am sorry. I have not. Let me see. The first visit was because of the fact that he had been turned down by an insurance company and he told me that at the first visit. But I was not very much interested in the cause or the diagnosis. I was most interested in the bodily condition I found this man to be in, and that is what I was after, the real history.



*Dr. Charles T. Sharpe—For Defendant—Redirect.*

1093

*Motion to Dismiss.*

*Robert M. Stewart—For Government—Direct.*

Q. Then you cannot tell us, I assume, just at what time a man has a coronary disease? A. No.

Mr. Behrens: He told us that, as I understand it.

Mr. Cahill: I was wondering whether his cards would tell him.

The Witness:—It is not here.

Mr. Cahill: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Cahill: The defendant rests.

1094

The Court: The defendant rests.

Mr. Cahill: So as not to delay the Court any further because of motions, I think it is sufficient to state that I renew the motions made at the close of the Government's case.

The Court: The motions will be denied.

Mr. Cahill: Exception.

The Court: Is the Government going to proceed with rebuttal?

Mr. Behrens: Yes.

The Court: Very well.

# REBUTTAL

1095

ROBERT M. STEWART, called as a witness on behalf of the Government, in rebuttal, being first duly sworn, testified as follows:

*Direct examination by Mr. Behrens.*

Q. Mr. Stewart, what is your occupation, please? A. Real estate and insurance broker.

Q. Where do you have your office? A. 43 North Park Avenue, in Rockville Centre.

Q. Were you located in Rockville Centre during the years 1936 and 1937? A. I was.

Q. With whom were you associated in those years? A. With Ralph P. Schley.

Q. Do you know this defendant, Murray Spies? A. I do.

Q. Could you tell us approximately when you first met him? A. I can only recollect approximately when I first met him. It was probably in 1936.

1097 Q. Did you have any negotiations or business dealings with him during the year 1936? A. Well, during 1936 and 1937 he was a prospect, you might say, and we were trying either to rent him a house or sell him property.

Q. During those years do you recall any occasions when you went with Mr. Spies looking for a house? A. In the necessary negotiations we probably did look at different houses and we also negotiated the purchase of a house for Mr. Spies.

Q. And that was completed some time along about August or September of 1937? A. That was prior to that, I believe, prior to any correspondence I had with him in March of 1937.

1098 Q. Would this copy of a letter help you to fix the date as being prior to March 1, 1937? A. Yes. I mean this would establish the fact that prior to this time, at some time prior to that, Mr. Spies lived at No. 1 Marion Place, in Rockville Centre, and I finally tried to negotiate the sale of that property to him, and subsequently, apparently, Mr. Spies moved to Eastern Parkway in Brooklyn, and this letter mentioned our address to him.

Q. In order to refresh your recollection I would like to show a copy of a letter dated July 9, 1937, and ask you whether shortly prior to that date you had a conversation with Mr. Spies relative to the purchase of some property?

A. Yes, sir, this letter refers to a contemplated purchase of 1 Marion Place and also contemplated the purchase—

The Court: That is not the question.

The Witness: Excuse me.

The Court: The question is whether this letter refreshes your recollection sufficiently as to the conversation had prior to a certain date, and the answer to that is either yes or no.

The Witness: The answer is yes.

Q. Would you give us the substance of that conversation, Mr. Stewart? A. Well, the substance of the conversation is a part of this letter. I do not know how you want me to answer it.

1100

The Court: Give the substance of the conversation. You may use the letter to refresh your recollection.

A. (Continued) The substance is this: He was interested in buying the property at 1 Marion Place at the time. I believe it was owned or controlled by the Mortgage Commission, and in the event that nothing could be done he was interested in purchasing a property on Berkshire Road. I cannot be certain that it would be immediately prior to that that this matter was discussed.

Q. Could you tell me whether at any time during the month of July, 1937, you actually received an offer from Mr. Spies as to the purchase of one of these parcels of property? A. No bona fide offer.

1101

Mr. Cahill: Just an offer?

The Witness: Excuse me.

Mr. Cahill: I think a conversation like that ought to be expunged.

The Court: Do you want to move to strike it out?

1102

*Robert M. Stewart—For Government—Direct.*

Mr. Cahill: Yes.

The Court: The motion is granted. The jury will disregard it.

Q. Do you refer to any offer or authorization on behalf of Mr. Spies negotiating the purchase of this property? A. The offer to purchase was made primarily in the nature of an inquiry. In other words, we do not consider the offer an offer unless it is accompanied by a contract. That is what I mean by my previous statement.

Q. Did the negotiation go through? A. Not as to the vacant land.

1103

Q. Could you tell us when for the first time, if at all, you called Mr. Spies' attention to the fact that there was a piece of property at 33 Lewis Place which might be available for him? A. Well, the first communication I had with Mr. Spies with reference to 33 Lewis Place was in the form of a letter here in August, which is the time I brought it to his attention, shortly after he came up to inspect the premises, and subsequently he bought it.

Q. Would you give us the approximate date when that contract was signed? A. Well, this letter was addressed to Mr. Spies on August 6th, 1937, and I would say within three weeks of that time we would have completed the necessary negotiations and have given the owner the substance of the offer submitted.

1104

Q. Do you recognize this paper as having anything to do with the purchase of the house? A. That is an office copy.

Mr. Cahill: I refrained from objection because I thought this might lead to something. I do not think this is proper rebuttal. It is not relevant to the issue here.

The Court: I assume the letter was given to him to refresh his recollection as to a conversation some time at or about August, 1937?

Mr. Behrens: Yes.

The Court: That is the purpose of the offer, perhaps. I would like to get down to the conversation, if we are going to have it.

Mr. Behrens: We are going to get down to the exchange of correspondence between Mr. Spies and Mr. Stewart. I am leading up to it now.

The Court: Very well.

Mr. Cahill: Exception.

Q. Will you tell us, Mr. Stewart, approximately when Mr. Spies agreed to take the house and gave you a deposit on it? A. We have a binder form on August 31, and on August 21 I had received from Mr. Spies a check in the sum of \$500 to secure the purchase of those premises.

1106

Q. Thereafter did you handle the confirmation transaction, or was that handled by Mr. Schley? A. I ultimately got Miss Keogan and a lawyer to take it over. From that point on negotiations were taken up by the broker, Mr. Schley, who prepared the contract and handled everything from that point on.

Q. During August of 1937 did you discuss with Mr. Spies the amount of the purchase price to be paid? A. Of course that was arrived at, the basis. In other words, the house was less; in the beginning \$17,500 and the ultimate purchase price was \$16,000.

Mr. Behrens: Thank you. You may inquire.

1107

*Cross-examination by Mr. Cahill.*

Q. I believe you said, Mr. Stewart, that probably Mr. Spies went with you to several places. Was that your testimony? A. It was.

Q. Did Mrs. Spies sometimes go with him to look at some of the places? A. I do not believe so. Possibly she did. That I would not say; yes or no.



Q. You are not sure about that? A. I know this: that on many occasions when we met him—on some occasions possibly Mrs. Spies looked at them first.

Q. Over how long a period did that go on? A. It went on from 1936 when they were first in No. 1 Marion Place, in the house. They were interested in renting or buying a house. Then, of course, during 1937, I attempted to rent them or sell them a house in town.

Q. Do you know that Mr. Spies was represented by another lawyer on the occasion of the closing? A. I did not attend the closing.

1109 Q. Are you familiar with the agreement that was finally made for the purchase? A. I am only familiar with the correspondence and the binder, up to that point. From that point on I am afraid that anything that happened to the situation was handled by Mr. Schley.

Q. Do you know that this is the fact: that the agreement of sale was closed by Mr. Spies and that then your attention was called to the fact that there were no radiators in some of the rooms, that that had been overlooked? A. I recall some correspondence prior to the closing. Shortly after this correspondence and shortly after the binder was taken I recall some correspondence with Mr. Schley with reference to radiators in a bedroom and in a sleeping room, and further I refresh my memory as to some question as to the size of the living room, as represented.

1110 Q. Don't you remember that the sale was closed and that then the terms were changed to provide for the radiators? A. I could not remember that. I was not there.

Q. Your associate did that? A. I did salesman's work and helped Mr. Schley.

Q. Do you know anything about any change in the agreement? A. Not at the closing. I have no knowledge of that. I was not there.

Q. Was there any change before the closing, after the agreement to purchase was made? A. From the change



there in that binder it was arranged that if we made any they would be made by Miss Keogan.

Mr. Cahill: Is Mr. Schley here?

Mr. Behrens: Yes.

The Witness: Oh, yes.

Mr. Cahill: All right.

RALPH P. SCHLEY, called as a witness on behalf of the Government, in rebuttal being first duly sworn, testified as follows:

1112

*Direct examination by Mr. Behrens.*

Q. Mr. Schley, what is your occupation? A. Real estate and insurance.

Q. Did you have an office in Rockville Centre in 1936 and 1937? A. Yes.

Q. At that time was Mr. Stewart a salesman in your employ? A. He was.

Q. Do you recall in the fall of 1937 after a binder had been drawn up and a \$500 check deposited that you had a certain exchange of correspondence with Mr. Spies? A. I do.

Q. I show you a telegram and several original letters, another telegram, copies of letters, and I ask you whether these various documents consist of the exchange of correspondence between you concerning certain adjustments to be made before closing? A. They do.

1113

Q. Do you recall having had any conversations with Mr. Spies during this period of time with respect to closing title? A. Yes.

Q. Do you recall how often, say, in the month of August, 1937, you talked with Mr. Spies about this property? A.

1114

*Ralph P. Schley—For Government—Direct.*

I think that the conversations amounted to not more than two Saturday afternoons.

Mr. Behrens: I would like to offer this bundle of papers which the witness has identified as this exchange of correspondence in evidence. I only offer it in evidence as showing the normal activity during 1937.

Mr. Cahill: If the Court please, I object to it as irrelevant. There is no issue as to the normal activity.

1115

The Court: He saw him often and frequently, and so forth. I will exclude them generally on the ground that the Court should not allow the record to become unduly voluminous. I think the witness testified that there was correspondence. You may state how many pieces of correspondence there were and the date of it and that they have to do with the purchase and sale of this home. I think the actual correspondence may or may not contain prejudicial matter that related to the issues. I think I will have to exclude it.

If you have a special letter covering the issues—

Mr. Behrens: No. I consider that these are the most significant letters that we have attempted to introduce. We are met with the misfortune of having introduced others less important and at earlier stage. I think on the issue of the mental ability and the issue of his ability to know what he was doing these letters are the clearest indication of that, to my mind.

1116

The Court: Why don't you offer the individual letters separately and we will pass on each one separately. I am concerned with the volume of material that has come in before the jury.

Mr. Behrens: This is the end.

The Court: Offer them individually and I will pass on them. At the present time I am sustaining the objection to the offer of the documents in bulk.

Q. Did you receive this telegram dated September 1, 1937, from Mr. Spies? A. I did.

Mr. Behrens: I offer it in evidence.

The Court: I assume you have an objection?

Mr. Cahill: Yes, sir.

The Court: Let me look at it first.

Mr. Cahill: Yes, sir (handing to the Court).

The Court: I overrule the objection.

Mr. Cahill: I respectfully except.

(Marked Government's Exhibit 105.)

Q. Mr. Schley, I show you a letter dated September 2nd, 1937, addressed to you, purporting to be in the handwriting and signed by the defendant, Mr. Spies, and I ask you whether you received that from him? A. I did. 1118

Mr. Behrens: I offer it in evidence.

Mr. Cahill: I make the same objection on the ground that it is cumulative.

The Court: I overrule your objection to this letter because it is relevant on the issue on the defendant's fears. He has testified as to the fears and as to his disease. This is concerning the nature of the fears set forth in that connection.

Mr. Cahill: I except to your Honor's remarks on that point.

The Court: I am sorry. The remarks should be reserved for the time of the charge. I thought I would explain the reason for my ruling. 1119

Mr. Cahill: I except to the ruling also.

The Court: I grant you an exception.

(Marked Government's Exhibit 106.)

Q. I show you a telegram dated September 4, 1937, and I ask you whether you got that from Mr. Spies? A. I did.

1120 *Ralph P. Schley—For Government—Direct—Cross.*

Mr. Behrens: I offer the telegram in evidence.

The Court: I will exclude it.

Q. I show you a letter addressed to you, dated September 6, 1937, purporting to be signed by Mr. Spies and ask you whether you got that from Mr. Spies? A. I did.

Mr. Behrens: I offer it in evidence.

The Court: I will exclude this letter and sustain your objection to it.

Q. I show you a letter of September 8, 1937, and ask you whether you got that from Mr. Spies? A. I did.

1121

Mr. Behrens: I will offer it in evidence.

The Court: I will exclude this letter.

Mr. Behrens: I have no further questions.

The Court: When I say I exclude it, I assume you have an objection, and I sustain your objection.

Mr. Cahill: Yes.

*Cross-examination by Mr. Cahill.*

Q. Mr. Spies, did you close the transaction? A. I attended the closing.

Q. Was the title taken in the name of Mr. Spies or Mrs. Spies?

1122

Mr. Behrens: I object to that as incompetent, irrelevant and immaterial.

The Court: Let me have the question.

(Question read.)

The Court: I will let him answer it.

A. I do not remember. I know that both attended the closing.

Q. Do you remember that Mr. and Mrs. Spies were represented by another lawyer. A. Yes.

Q. Do you remember that Mr. Spies left the discussions to get that lawyer? A. No.

Q. Do you remember that?

The Court: The stenographer cannot get your answer when you shake your head. You will have to speak up.

The Witness: No.

Q. Do you know when that lawyer came into the matter?

A. No. I know there was an attorney at the closing, but when he came in I do not know.

1124

Q. Don't you remember Mr. Spies going out and going upstairs or downstairs to get a lawyer? A. I cannot say that I do.

Mr. Behrens: I object. He has already answered.

The Court: Allowed. What is your answer?

The Witness: I cannot say that I did.

Q. Do you have any recollection on that subject? A. I know when we closed there were a lot of people there.

Q. The question as to when the lawyer was brought into it, have you any recollection? A. At the closing.

Q. Was it at the beginning or the end of the closing?

A. During the closing or at the closing. He was there. That is all I know.

1125

Q. Do you recall the payment and the binder? I believe there is some evidence in the testimony by your associate as to a binder on the purchase? A. Yes.

Q. Whatever binder may have been given was just a paper prepared as part of the binder? A. Yes.

Q. Do you recall that Mrs. Spies looked at the house several times? A. Yes.

1126

*Ralph P. Schley—For Government—Cross.*  
*Dr. Israel Trachtenberg—For Government—Direct.*

Q. Do you remember that Mr. Spies did so? A. Yes.

Q. Do you remember that after the binder was given, before the closing, Mr. Spies called attention to the fact that he had overlooked the matter of radiation in one or more of the rooms? A. Yes, I remember that.

Q. Do you remember that provision was then made for the placing of radiators and heat in the house? A. It was before the closing.

Q. Was it after the binder? A. Yes.

Q. Was it after Mr. Spies had looked at the place? A. Yes.

1127

Mr. Cahill: That is all.

Mr. Behrens: I have no further questions.  
 (Witness excused.)

DR. ISRAEL TRACHTENBERG, called as a witness on behalf of the Government, in rebuttal, being first duly sworn, testified as follows:

*Direct examination by Mr. Behrens.*

Q. Doctor, you are admitted to practice medicine in the State of New York? A. Yes.

1128

Q. You were so admitted in the year 1938, I assume? A. In 1928.

Q. 1928? A. Yes.

Q. In the year 1938, specifically July 23, 1938, were you the doctor who examined applicants for life insurance in behalf of the Security Mutual Life Insurance Company? A. Yes, I was.

Q. I show you Government's Exhibit 64 in evidence and ask you whether you have ever seen the second page of that before? A. Yes.



*Dr. Israel Trachtenberg—For Government—Direct—Cross.* 1129

Q. Is that your signature that appears thereon? A. That is right.

Q. Will you say that on the date set forth Mr. Spies appeared before you for examination? A. Well, I went to Mr. Spies' home and examined him there.

The Court: What is the date of the examination?

The Witness: July 23, 1938.

Q. I notice a great many questions on that page and then written after the questions are certain answers? A. Yes.

Q. Did you ask those questions of Mr. Spies? A. Yes.

Q. Did you put down the answers he gave you? A. That is right.

1130

Mr. Behrens: You may inquire.

*Cross-examination by Mr. Cahill.*

Q. Let me see what the page is. A. (Witness hands to counsel.)

Q. You had more conversation with Mr. Spies than the record in this paper, did you not? A. Oh, probably.

Q. Do you recall it? A. No, I do not.

Q. Do you recall any discussion with him about visiting doctors who told him that he did not have heart disease? A. No, I believe not. I asked him whether he had been to any doctors in the last five years, and he told me he had not.

1131

Q. Are you sure about that? A. If it is on the paper, then I am sure of it.

Q. Is your testimony based solely on what is on the paper? A. Practically what is on the paper.

Q. You do not have any other memorandum? A. No.

Q. And no independent recollection of it? A. No. We examine so many during the year that it is almost impossible to have an independent recollection.

1132 *Dr. Israel Trachtenberg—For Government—Cross.*

Q. How many would you examine in the course of a year, about this time in 1938? A. Say about 500 or 600, somewhere in that neighborhood.

Q. Would you have as many as 20 in a day sometimes? A. Oh, no.

Q. How many? A. The most that would ever come would be four or five a day.

Q. Did you give your whole day to this? A. No.

Q. You had a practice besides? A. Yes.

Q. How many hours a day did you give to it? A. No determined hours per day. We made the calls when we received them. We were paid individually for each call.

1133

Mr. Cahill: No further questions.

Mr. Behrens: All right, doctor, thank you.

(Witness excused.)

Mr. Behrens: There are two of these questions and answers that I would like to read to the jury at this time.

The Court: You may. Give the dates.

Mr. Behrens: This is Government's Exhibit 64. The date is July 23, 1938.

"15. Have you consulted a physician within the past 5 years? If so give particulars about it." The answer is "No."

"16. Did you ever suffer from pneumonia, nervous strain, nervous depression or overwork?" And the answer is "No."

1134

EDWARD F. DINGIVAN, called as a witness on behalf of the Government, in rebuttal, being first duly sworn, testified as follows:

*Direct examination by Mr. Behrens.*

Q. Mr. Dingivan, what is your occupation? A. Chief of the Income Tax Division of the Collector of Internal Revenue for the Second District, New York.

Q. Do you have your office in the Custom House in New York City? A. Yes.

Q. How long have you been connected with the Government in this capacity, Mr. Dingivan? A. Twenty years.

Q. In 1937 or more specifically in the fall of 1937 did you hold the same position you do now? A. Yes, sir. 1136

Q. Specifically what are your duties? A. I am responsible for the preparation and maintenance of the records covering the filing of income tax returns in the office of the collector.

Q. Included in that do you have charge of the records with respect to extensions of time granted to taxpayers? A. Yes, sir.

Q. In the fall of 1937, Mr. Dingivan, will you tell us approximately how many female employees were employed by the Collector of Internal Revenue in the Custom House? A. I would say approximately 250.

Q. Where a person has already written in and has obtained an extension, or two extensions of time within which to file the return, will you tell us where those papers are put? A. They are filed alphabetically. The alphabet is broken down in filing, a rough sort of method, and jacketed separately. 1137

Q. They are clipped together and put in with others? A. With others.

Q. In the same alphabetical group? A. Yes.

1138

*Edward F. Dingivan—For Government—Direct.*

Q. Do you know where the folder for each taxpayer who has gotten an extension of that character is? A. That is correct.

Q. Is there in—

The Court: Was that the condition in 1937?

The Witness: Yes, your Honor.

1139

Q. Where the taxpayer has gotten those extensions and you keep these papers clipped together in a file, is there any other record in the office of the Collector Revenue relating to that particular taxpayer? A. In connection with the extension of time during the years 1937 and 1938 an index card was prepared which was filed in the cashier's division covering the extension of time.

Q. Was there any record, any other record, in the way of the files kept at all by the collector? A. In connection with that particular taxpayer?

Q. Were there any rules or regulations promulgated by the Treasury Department in the year 1937 with respect to the employees in the collector's office discussing tax matters over the telephone with taxpayers?

Mr. Cahill: I object to that on the ground that we are not concerned with the practice, but what was done on a particular occasion.

The Court: I will sustain the objection.

1140

Mr. Behrens: I cannot obviously go further than the practice.

Mr. Cahill: If the Court please, I do not think—

The Court: I do not need any argument. You won your motion.

Mr. Behrens: I simply point out to your Honor the impossibility of bringing here all persons who could give us definite information.

*Edward F. Dingivan—For Government—Cross—Redirect.* 1141

The Court: The lack of the capacity to disprove has already been made and it is on the record, to the extent that the jury is willing to believe it.

Mr. Behrens: I have no further questions.

*Cross-examination by Mr. Cahill.*

Q. You have a copy of the applications for extensions in your files? A. We do.

Q. In alphabetical order? A. Yes.

Q. And the index card for those particular applications?

A. For each particular year an index card.

Mr. Cahill: That is all.

1142

*Redirect examination by Mr. Behrens.*

Q. Will you look at Government's Exhibits 8 to 16 in evidence and tell me whether or not those are complete files of Murray R. Spies for the year 1936, or a tax return for the year 1936?

Mr. Cahill: What is the question?

Mr. Behrens: Whether that is a complete file of the tax return of Murray R. Spies for the year 1936?

A. Yes.

Mr. Behrens: I have no more questions.

1143

Mr. Cahill: That is all.

(Witness excused.)

Mr. Cahill: If your Honor please, in connection with Dr. Trachtenberg's testimony Mr. Behrens read something from Exhibit 64, and I would like to read just a line to the jury.

The Court: Which document?

1144

*John H. Reighley—For Government—Direct.*

Mr. Cahill: This is an application of the Security Mutual Insurance Company from which Mr. Behrens read.

"Q. 22. When were you last examined for life insurance?"

A. 1936.

"Q. Was insurance issued as applied for? A. No.

"Q. Give the name of the company: A. Equitable."

The Court: Call your next witness.

1145

JOHN H. REIGHLEY, recalled in rebuttal.

*Direct examination by Mr. Behrens.*

Q. Mr. Reighley, I show you Government's Exhibit 54 for Identification and ask you what it is? A. It is the list of unexplained bank deposits made from my various analyses of these accounts.

Mr. Cahill: Would you mind speaking just a little louder?

Q. Does that contain all of these unexplained items which you went over on at least one occasion with Mr. Spies? A. Yes, sir.

1146

Mr. Behrens: I will offer it in evidence.

Mr. Cahill: This is offered as a form of computation?

The Court: As a compilation.

Mr. Behrens: I do not offer it as having any probative force whatever.

Mr. Cahill: In that case I do not object to it. I do not object to the mere fact that it is a computation.



The Court: It is a compilation of items called to the defendant's attention?

Mr. Behrens: Yes.

The Court: By the witness, which the witness has represented as unexplained items.

(Government's Exhibit 54 for Identification now received in evidence.)

Mr. Behrens: I have no further questions, Mr. Reighley.

*Cross-examination by Mr. Cahill.*

Q. Are all of the items of \$10,000 which you call unexplained income shown on that exhibit? A. Yes, they are all shown in that statement. 1148

Q. Does that include the \$1,000 shown on Exhibit 47, "Notes payable of United Sponsors"?

Mr. Behrens: What is the date, sir?

Mr. Cahill: Let me see, and I will get it for you.

Q. December 11. What year is it? 1936? The \$1,000? A. These are all 1935. The payments are on this side here (indicating).

Q. That is the \$1,000 which you included in the \$10,000-odd of unexplained income? A. I think you will have to come over on this side. That is an item that has a question about it on account of salary. If it is in there, it would have to be in some of these figures. 1149

Q. Is that \$1,000 included in the unexplained items? A. No, it would not be set up in there.

Q. I call your attention to the word "Out," opposite "Salary of M. R. S.," and ask you if you know what that means? A. I do not know.

Q. In either of the \$1,000 credit? A. I do not know what that means.

1150

*Dr. Frank J. Curran—For Government—Direct.*

Mr. Cahill: That is all.

Mr. Behrens: Your Honor, the Government has just one more witness. He will not be available until tomorrow. I shall finish the examination in a short while.

The Court: Is that your last witness?

Mr. Behrens: My last witness.

The Court: Very well. Will you have anything further?

Mr. Cahill: I think not.

The Court: We will take an adjournment until tomorrow at 11 o'clock.

1151

(Adjourned to Friday, August 15, 1941, at 11 A. M.)

New York, August 15, 1941, 11:00 A. M.

TRIAL CONTINUED.

Mr. Behrens: I have just one witness, your Honor.

The Court: You may proceed.

DR. FRANK J. CURRAN, called on behalf of the Government, in rebuttal, being first duly sworn, testified as follows:

1152

*Direct examination by Mr. Behrens.*

Q. Dr. Curran, are you licensed to practice medicine in the State of New York? A. I am.

Q. Are you a psychiatrist? A. I am.

Q. Are you a neurologist? A. I am.

Q. Will you give us your qualifications in those fields, please? A. I graduated from the University of Minnesota Medical School in 1928, had a rotating internship in the Minneapolis General Hospital for one year. Then I was

on the staff as resident physician in the Boston Psychopathic Hospital, majoring in psychiatry for one and one-half years. I entered the service of the Bellevue Hospital for one year. Since 1932 I have been employed in the psychiatric division of Bellevue Hospital. At present I am one of the senior psychiatrists there.

Q. In the course of the last nine or ten years at Bellevue would you estimate the number of persons you have seen who are suffering from neurotic symptoms? A. The number of patients suffering from neurotic symptoms which I have personally examined varies from year to year. In some years I am in charge of wards where the majority of the patients are primarily neurotic, while at other times I have been in charge of wards where people are psychotic or insane. I have seen 500 to 1000 neurotics each year during the time I have been there.

1154

Q. What is the difference between a psychosis and a neurosis? A. The term psychosis is what lay people term insanity. That is, a person is psychotic when he has shown an abnormal deviation from what is normal for him in the way of thoughts or acts showing that he is a danger to himself or others and must be committed to a mental hospital. A neurosis is a milder form of mental illness and is the result of conflicts which occur between the conscious part of one's personality and the unconscious affirmative drives of an individual.

The symptoms of neurosis may be of various types. Some people may have fears. They might fear that they are dying. They might fear that they are going insane. They might fear that they have various diseases. Ordinarily such people will have a chief complaint of fatigability, just when they are trying to do all the work but when they cannot concentrate.

1155

Other people will have what you call hysterical symptoms and, for example, say they cannot see or they believe they are paralyzed in one arm or one leg. Others may

1156 · *Dr. Frank J. Curran—For Government—Direct.*

develop certain fears or phobias and are afraid to go into closed places such as in an elevator or in a subway. Or they may be afraid to go into tall buildings for fear they may drop from the building.

A neurotic individual is not insane. He realizes that his ideas are abnormal but he still is struggling with them. However, we use the term "insight," his insight into his symptoms. He realizes that his symptoms are absurd, but he still clings to them.

1157 Q. What are the typical personality features of a person suffering from neurosis? A. A person suffering from neurosis is frequently described as an individual who acts like a spoiled child. He is very childish in his demands for attention. He wants to tell about his symptoms to others. He is constantly seeking love, seeking attention from others. In addition to this he is usually a very conscientious individual. He is very neat and very orderly. He insists on having everything done in just the proper way. If, for example, somebody drops some ashes on the carpet he says to get an ash tray. He becomes very upset about it. So that his neatness and his orderliness of mind and his very marked consciousness are things which are very commonly seen in the personality of a neurotic.

Q. Do we find any of these neurotic symptoms whatever in children? A. These neurotic symptoms are very frequently seen in children.

1158 Q. Would you give us an example on that? A. For example, many children when they walk down the street begin by playing a game such as stepping on the cracks in the sidewalk or avoiding stepping in cracks in the sidewalk, and sometimes they have an accident when they have stepped on a crack when they have been trying to avoid stepping on a crack. Sometimes they will develop a ritual in which they feel they must avoid ever stepping on cracks from then on for fear of future trouble.

Or some of them have what we call a superstition such as breaking a mirror and having bad luck.

All individuals who are normal have neurotic symptoms some time in their life.

Q. Would you say that it is a conclusion that when one has a neurosis one's judgment is impaired? A. I would not.

Q. There is another term I wish you would tell us about, and that is this neurocirculatory asthenia. Just what is that, doctor? A. That is a term which is used by many physicians to describe a condition in which a patient complains that he has something wrong with his heart and the doctor cannot find anything wrong with his heart. So that he has had what we call an imaginary heart disease rather than a real heart disease. 1160

The symptoms which the patient complains of and which make him think that there is something wrong with his heart are usually that he is short of breath, he feels that his heart is going very fast and believes that his pulse is more rapid than normal. He often sweats and he has tremors of his hands.

Q. Will you tell us, doctor, whether there is any difference between this psychoneurosis and neurosis itself? Each seems to have been used rather interchangeably here. A. I believe that most physicians use the terms interchangeably. For most practical purposes they are considered synonymous. However, we teach our medical students that there is some technical difference, that neuroses are usually less severe than the psychoneuroses. The symptoms are different and the treatment in one is much less drastic than in another. 1161

Q. Where a man is neurotic, is it possible for a psychiatrist to tell to what extent that man is capable or incapable of performing his daily pursuits without knowing the exact activities of this man during a given period of



1162 *Dr. Frank J. Curran—For Government—Direct—Cross.*

time? A. In my opinion it would not be possible to make such a diagnosis.

Q. What is the best of your opinion in that respect, doctor? A. My best opinion is that in order to evaluate any mental disorder or neuroses, psychoneuroses or psychosis, that we need to know about the present symptoms which the man complains of and also must know a great deal about his background, his past life, and things which he has primarily been able to accomplish.

For example, two men might be doing similar work. One man may be more intelligent, more efficient, and accomplish twice as much as the next person. Then if he develops a mental disorder he might be only able to do half his normal work, but he is still doing as much work as the man alongside him, who is less intelligent and less efficient.

When I know what is normal with that person, then I can define what is abnormal.

Mr. Behrens: You may inquire.

*Cross-examination by Mr. Cahill.*

Q. How long did you say you have been engaged in this special field, doctor? A. Since 1929.

Q. Did you give us the date 1932? A. I said I have been on the staff at Bellevue in the psychiatric division since 1932.

1164 Q. You do recognize a definite disease known as psychoneurosis, do you not? A. I do.

Q. There is some difference between that and neurosis? A. There is.

Q. If one is suffering from that disease his judgment might be impaired; is that not the fact? A. Which does?

Q. Psychoneurosis? A. No. It is one of the points which we emphasize in teaching medical students that people who have neuroses have a good insight into their



condition. They realize that their ideas are absurd. That is why they do not have to be committed to a hospital.

Q. But still those ideas persist? A. That is true.

Q. They are not able to get rid of them? A. Without treatment.

Q. Assume that they have intellectual capacity to understand the abnormality of those symptoms, is it not a fact that nevertheless their will power is impaired by that disease? A. People suffering from neurosis sometimes fear that they cannot concentrate as well or they cannot do things they want to do that other people do. They simply believe that they cannot perform a certain task and things which they are able to do. Each one of the typical symptoms of the neurotic is a symptom as to what they are able to do.

1166

Q. There is some effect of this disease on the will to do things? A. There is.

Q. There is a tendency to procrastinate developed in some individual suffering from that disease? A. That is true.

Q. Without considering the particular cases, the history of the case, the symptoms existing over a period of years, you could not express any opinion as to the effect of that disease on a particular day, isn't that a fact? A. That is my opinion, yes.

Q. You, of course, place in a different class a matured individual suffering from that disease and a child who may be nervous in some degree in the early stages of life, do you not? A. Not only do I distinguish between a child and an adult, but between an adult who has neurotic symptoms and an adult who is suffering from neurosis, which is a mental disorder.

1167

Q. It is a fact that an adult suffering from psychoneurosis has an increase at times in his phobias? A. That is true.

1168

*Dr. Frank J. Curran—For Government—Cross.  
Motion to Dismiss.*

Q. And at those times he is incapacitated for the performance of his ordinary duties for a short period and sometimes a long period? They vary? A. Yes.

Q. It depends on the individual case? A. Yes.

Q. You have to study the history of the individual and the symptoms over a long time before you could express an opinion as to the precise effect of this disease on him? A. That is what I have already said.

Mr. Cahill: That is all.

Mr. Behrens: Thank you.

(Witness excused.)

1169

Mr. Behrens: The Government rests, your Honor.

Mr. Cahill: I find that I have one check which was offered for identification, and Mr. Spies testified that a check exactly like that, I believe, was presented to him.

Mr. Behrens: I object.

Mr. Cahill: He could not say it was that check, but a check like that was presented to him, and I would like to have it identified.

Mr. Behrens: I object to any identification. The witness has refused to identify it and said that he could not say that that was a photostatic copy of the check he claims he endorsed, because there was no back on it.

1170 Mr. Cahill: He said there was a check to his order drawn on a Jersey bank, I think he said the North Bergen Bank, and it was present at the time of the closing.

The Court: I will allow it.

(Defendant's Exhibit B for Identification now received in evidence.)

Mr. Cahill: This being the end of the entire case, the defendant's case also, I renew the motions which I made before.

The Court: It will be noted and denied, and you will be allowed an exception.

Mr. Cahill: Shall I proceed now?

The Court: You may proceed.

(Mr. Cahill began his summation to the jury on behalf of the defendant.)

The Court: We will take a recess to 2 o'clock instead of 2.15.

(Recess until 2 P. M.)

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AFTERNOON SESSION—2 P. M.)

(Mr. Cahill resumed and completed his summation to the jury on behalf of the defendant.)

1172

(Mr. Behrens began his summation to the jury on behalf of the Government. During the summation the following occurred:)

Mr. Cahill: I dislike to interrupt my opponent, but the doctor said specifically that he could not recall which one was asked.

The Court: The jury will recollect the testimony and draw its own inferences.

(Mr. Behrens resumed his summation to the jury and the following occurred:)

Mr. Behrens: Was it because of a fear that he said he did not know which was the debit and which was the credit side of the account?

Mr. Cahill: Again I think that answer was not given to that question asked in that way. There is no evidence as to that. It is a different question.

1173

The Court: If the question and answer were not given, the jury will disregard it. The jurors' recollection will control.

The Court will take a very short recess at this time.

(Short recess.)

*Requests to Charge.*

1174

The following requests to charge were submitted on behalf of the defendant and are spread upon the record as follows:

1. The indictment is no evidence of guilt and is not to be considered by you as evidence at all.

2. If you have a reasonable doubt as to the guilt or innocence of the defendant, you must return a verdict of not guilty.

3. The burden of proof rests upon the Government throughout the trial of establishing the guilt of the defendant beyond a reasonable doubt.

1175

4. The defendant is presumed to be innocent and this presumption continues throughout the trial until such time as you may find that the presumption has been overcome by evidence proving the guilt of the defendant beyond a reasonable doubt.

5. The defendant is not charged in the indictment with wilful failure to file a return, which he was required to file, and you may not find him guilty of a failure to file a return, whether it be wilful or not.

6. The defendant is not charged in the indictment with a wilful failure to pay a tax, which was due and you may not find him guilty of failure to pay a tax, whether it be wilful or not.

1176

7. You may not find the defendant guilty of a wilful attempt to defeat and evade the income tax, if you find only that he had wilfully failed to make a return of taxable income and has wilfully failed to pay the tax on that income.

8. Wilful failure to file a return and wilful failure to pay the tax on an income are offenses distinct from the wilful attempt to defeat or evade the income tax charged in the indictment.

9. The only accusation against the defendant in the indictment and the only one on which he may be found guilty is wilful attempt to defeat and evade the income tax.

10. "Wilful" as used in the statute does not mean simply a voluntary or a deliberate or intentional act or omission, but means an act or omission done on purpose with corrupt intent and evil purpose.

11. "Attempt" means to try to do or accomplish.

12. "Evade" as used in the statute and in the indictment is used in its normal meaning and means "to get away from by artifice; to avoid by dexterity, trick, address or ingenuity."

1178

13. Unless you find that the defendant with corrupt intent and evil purpose tried by artifice, dexterity, trick, address or ingenuity to cheat and defraud the Government of the tax, you must acquit him.

14. Before you can find the defendant guilty of the accusation in this case you must find that he had a specific wrongful intent, that is actual knowledge of the existence of the obligation coupled with a wrongful intent to evade it.

15. There is no evidence of any scheme or artifice by the defendant to evade or defeat the Income Tax Laws.

16. If you find that the defendant failed to report his income for the year 1936 and failed to pay the tax thereon only because of carelessness or negligence or procrastination, you must find him not guilty of the accusation in the indictment.

1179

17. The accusation in the indictment means that the defendant attempted to deceive or cheat the Government with respect to the tax on his income for the year 1936.

18. The defendant cannot be found guilty of a wilful attempt to defeat and evade the income tax, if you find that

he intended before the Government's investigation began, at some time to file his report and pay his tax.

19. The evidence that the defendant applied for and obtained extensions of time to file the return on his income for the year 1936, and to pay his tax is evidence, which you must consider in determining whether the defendant willfully attempted to evade and defeat the income tax.

20. The evidence that the defendant wrote to brokerage houses for information respecting his accounts so that he could give the Government information is evidence which you must consider in determining whether the defendant willfully attempted to evade and defeat the income tax.

1181

21. If you find that the defendant was suffering from a disease or physical or mental condition which prevented or interfered with the exercise of his will power and caused him to neglect and delay the filing of a report and the payment of the tax on his income, you must find the defendant not guilty of the accusation set forth in the indictment.

22. If you find that the defendant was suffering from some disease or condition, which caused him to procrastinate and to put over and delay action on matters of importance, or to lose sight of their importance and that this condition caused him to neglect the filing of a report and the payment of the tax on his income, you must acquit him of the accusation set forth in the indictment.

1182

23. If you find that the defendant had the mental capacity to report his income, but because of the condition, from which he was suffering had not the power of will to prepare and file his return, you must acquit him.

24. If you find that the defendant had the mental capacity to report his income tax, but was suffering from an inhibition, which prevented him from exercising his will to do so, you must find the defendant not guilty.



*Requests to Charge.*

1183

25. The amount of the tax due must not influence your decision on the question whether the crime alleged has been committed.

26. It is not your function to determine how much tax is due. It was conceded by the defendant that a tax was due.

27. The liability of the defendant in a civil proceeding to pay any tax due remains separate and distinct from the issues in this trial, is not affected by this trial, and you must not consider it in determining whether defendant is guilty or not guilty in this case.

28. If you find that, without reference to or consideration of his physical or mental condition, the failure of defendant to file his return and pay his tax was due to procrastination, negligence or carelessness, you must acquit him. 1184

29. The statute, which is in derogation of the common law, must be strictly construed against the Government and in favor of the taxpayer.

30. The defendant cannot be found guilty of the accusation in the indictment as of any date prior to the expiration of the period, for which the Government had extended defendant's time to file his return and to pay his tax, that is the period until and including June 15th, 1937.

1185

1186

**Charge of the Court.****RIFKIND, D. J.:**

1187

The Court: Members of the jury: For the past two weeks you and I have been in a sort of limited partnership trying this case. In that partnership you have certain duties to perform and I have certain duties to perform. Fortunately for both partners, the jury and the Court, we have been assisted in the trial by two very able attorneys who have tried the case for the Government and for the defendant, who have given, both of them, a fair and complete and thorough trial. It is my duty now to charge you concerning the law which you are to apply to the facts as you find them, and it is your duty, a duty that you have taken an oath to perform, just as I have taken an oath to perform mine, to lay aside all prejudices, to dismiss from your mind all sentiment or sympathy, to suppress any bias you may have for or against the Government or for or against the defendant. You are to deliberate upon the facts fairly and impartially.

1188

May I add that some of you may have had unfortunate experiences with lawyers. It is not your privilege to take that out upon this defendant because he is a lawyer. You must suppress any such prejudice which may be latent in your mind. Some of you may have had a very unpleasant experience with income tax collectors, but the United States Government is not to be penalized in this case on account of that misadventure. You must suppress any rancor that may remain in your mind by reason of any such experience.

The United States Government has the right to impose taxes and it has in this case imposed a tax. It is your duty to deliberate upon the facts and find the facts which you believe to be true.

I am going to charge you on a number of principles of law which are intended to protect the defendant in any criminal case. Concerning the indictment itself, you have

already been given some information about it. The indictment accuses the defendant, Murray R. Spies, of a violation of a law of the United States in that in 1937 he wilfully attempted to evade and defeat an income tax of about \$8,800 payable by him on the income received by him in the year 1936.

The law of the United States which the defendant is charged with violating is known as Section 145b of the United States Code, which in so far as it applies to the present case, reads substantially as follows: "Any person who wilfully attempts"—I want you to listen carefully to each of these words—"who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall" be subject to the penalties prescribed in the statute.

1190

The indictment to which I have referred, although it has been found by a grand jury, is not any evidence in any sense. It is a mere accusation which it is incumbent upon the Government to sustain by the proper measure of proof, and I shall hereafter instruct you as to what is the proper measure of proof.

Every defendant in a criminal case is presumed at the outset to be innocent. There is no more sacred proposition of law known to the American system of jurisprudence than this presumption to which I have just referred. This presumption exists in his favor and abides with him for his protection until his guilt is established by the requisite measure of proof. This is true not only respecting the accusation as a whole but also with respect to every material element of the accusation.

1191

The burden of proving guilt rests upon the Government and must be sustained by evidence which establishes guilt beyond a reasonable doubt. That is the requisite measure of proof to which I have previously referred. This burden rests upon the Government throughout the trial.

Now I have used the term "reasonable doubt", and I shall try to explain to you what is meant by those words. The term "reasonable doubt" means a doubt for which a good reason can be given in the light of all the evidence. It means a doubt which is substantial and not merely shadowy. It does not mean a doubt which is merely capricious or speculative. Neither does it mean a doubt born of reluctance on the part of the jury to do an unpleasant duty, or a doubt arising out of sympathy for the defendant or anything other than a candid consideration of all of the evidence presented.

1193 The term I used was "reasonable doubt". I use that term because the law says that it is not necessary for the Government to prove the guilt of the defendant beyond all possible doubt. If that were the rule, few men, however guilty, would be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible of proof to a mathematical certainty. In consequence, the law is that in a criminal case it is enough if the defendant's guilt is established beyond a reasonable doubt—not beyond all doubt.

1194 There are additional provisions of law intended for the protection of a defendant in a criminal case. If the evidence can be reconciled either with the theory of innocence or with the theory of guilt, the law requires that the defendant, not the Government, be given the benefit of the doubt and that the theory of innocence be adopted and prevail.

Similarly whenever a circumstance in evidence—which is relied on as evidence of criminal guilt—is susceptible of two inferences, one of which is in favor of innocence and the other in favor of guilt, such circumstance has no value as evidence against the defendant. In other words, a defendant is entitled to the benefit of any doubt where an innocent construction is possible.

I have already made some references to the relative functions of the Court and the jury. Let me state them a little bit more fully. It is for the Court to state the principles of law which are applicable to the case, and it is also for the Court to solve all questions with respect to the admission and rejection of evidence.

The jury is the sole judge of the issues of fact and of the real truth of whatever is involved in those issues.

It is also the province of the Court to assist the jury in so far as it can be done by referring to subsidiary questions of fact and to the evidence or state of evidence bearing upon them. But the jury should regard all expressions of the Court in this connection as made for the purpose of aiding the jury and not of directing the jury. If the Court's expressions as to the evidence are not in accord with the jury's understanding of the evidence or its reasonable import, the Court's impressions are to be rejected and effect is to be given by the jury to its own understanding and its own conclusion; for in the last analysis the jury is the sole and exclusive judge of all questions of fact.

1196

With respect to the testimony that has been offered you have two problems. One problem deals with the credibility of the testimony, and the second problem deals with the weight which must be given to the testimony. The jury is the exclusive judge of the weight of each of the several items of evidence and is also the exclusive judge of the credibility of each of the witnesses. In passing upon the credibility of a witness and in deciding whether or not you are to believe him in whole or in part and in judging what weight shall be given to his testimony the jury may use its common sense. It may consider his appearance upon the witness stand, whether he testified with candor or otherwise and his interest in the case. It may consider the witness' relationship to the controversy and to the parties, his bias or impartiality, the reasonableness, on the basis of the jury's own experience, as to his statements, the strength

1197



or weakness of his recollection, his opportunity to observe the facts to which he testified. In other words, you may view his testimony in the light of all of the testimony and the attendant facts and circumstances in the case.

It is the privilege of a defendant in a criminal case to testify as a witness, if he so chooses. The defendant in this case has so chosen. When the defendant does testify his credibility is to be determined in the light of his interest which is usually greater than that of any other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony.

Jurors frequently inquire about circumstantial evidence. There is no mystery about that subject at all. Circumstantial evidence is legal evidence, and the jury must act upon it as if it were direct evidence when it satisfies the jury beyond a reasonable doubt. Circumstantial evidence, when it is strong and convincing, often is the most satisfactory evidence from which conclusions as to guilt or innocence can be drawn.

Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which lead the mind to a conclusion that the disputed fact is true.

Perhaps I ought to illustrate. If a witness testifies that he saw snow falling, that would be direct evidence. If a witness testifies that he went to bed and the streets were clear and when he awoke in the morning the streets and the ground and the rooftops were covered with snow, that is circumstantial evidence of the fact that it had been snowing during the night. You can readily see that it is frequently more difficult to fabricate all of the circumstances necessary for the realization of circumstantial evidence than to fabricate direct testimony.

Where it appears that any witness has wilfully testified falsely respecting a material matter, the jury may reject his testimony in its entirety (save as it finds corroboration or support in other evidence), or may disregard his



testimony as to those facts whereof he testified falsely and accept it as to other facts with respect to which it deems it entitled to belief.

Testimony in reference to the defendant's reputation should be considered, since good character may itself sometimes create a reasonable doubt. But that in itself would not justify the jury in excusing the defendant if you are satisfied beyond a reasonable doubt of his guilt. In the last analysis, however, good reputation is to be weighed by the jury along with all the evidence in the case.

You have heard a number of experts on the stand in this case. The credibility of witnesses who are experts, and the weight of their testimony is likewise a question for the jury. The jury is not bound to accept the opinion of an expert simply because no other expert contradicted him. Indeed the only difference between expert witnesses and other witnesses is that experts are permitted, under the law, to testify as to their opinions. The jury must decide whether and to what extent to accept the opinions of the experts. 1202

One of the witnesses called on behalf of the defendant—Dr. Jewett—had not examined the defendant. You will recall that his testimony was based upon a hypothetical question. It is within the province of the jury to decide which of the facts hypothetically stated to that witness actually exist. If the jury finds that none of the facts hypothetically stated is true, then, of course, the opinion is entirely without weight. It is not, however, to be understood that the entire opinion fails unless all of the assumed facts are found by the jury to be true. The jury may accord weight to the expert's answer as it find the assumed facts to have been proven. 1203

Now we get down to the basic questions in this particular case. The basic questions you must decide are whether for the year 1936 the defendant owed an income tax and, if so, whether he wilfully attempted to evade or defeat that tax.

The evidence is uncontradicted that (1) the defendant owed some tax; (2) that he filed no return except the tentative return filed in his behalf by Rosenberg which did not disclose the defendant's income; (3) that the defendant has not paid the tax.

I say that those three propositions are uncontradicted. These alone are insufficient to convict the defendant of the crime with which he is charged. Mere neglect or carelessness or other legitimate cause resulting in a failure to file a return or to pay a tax, whether induced by illness or otherwise, provided it is unaccompanied by bad faith, is not sufficient to justify a conviction.

1205 Before you find the defendant guilty you must find that intentionally and wilfully he attempted to evade or defeat the tax.

The law uses the word "attempt". Attempt means to try, to do or accomplish. In order to find an attempt it is not necessary to find affirmative steps to accomplish the prohibited purpose. An attempt may be found on the basis of inactivity or on refraining to act, as well.

The statute also uses the word "evade". That word has been defined to mean to avoid by artifice, to avoid by device or stratagem, by concealment, by intentionally withholding a fact which ought to be communicated.

Such evasion must be differentiated from the use of legitimate means to minimize the tax. The latter is not a crime; but a wilful attempt to evade a tax is a crime.

1206 The statute uses the word "wilfully". I will try to define that word. Wilfully often denotes an act which is intentional, or knowing or voluntary as distinguished from accidental. But when used in a criminal statute, it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether or not one has the right to so act.

Again with respect to wilfulness I will charge you, as I did with respect to attempt, that wilfulness is not limited to acts of commission—affirmative acts. It may describe omissions, or failure to take required action.

Since wilfulness is a statement of mind, like intention, direct evidence testimony thereof is rarely available, and you should therefore rely upon circumstantial evidence to find wilfulness, provided the evidence satisfies you beyond a reasonable doubt.

In the case before you it is obviously impossible to prove by direct testimony the contents of the defendant's mind at the time when the offense is alleged to have been committed. You may and you should draw the reasonable inferences from his conduct and from all the facts and circumstances in order to determine what his intention was.

1208

The precise amount of tax due is not an issue in this case, and the Government is not under the burden of proving that the amount due is exactly as stated in the indictment. Nor is it necessary for you to find the exact amount of the defendant's net income for the year 1936.

The defendant is not charged in the indictment with wilful failure to file a return, which he was required to file; and you may not find him guilty of a failure to file that return whether it be wilful or not.

The defendant is not charged in the indictment with a wilful failure to pay a tax, which was due, and you may not find him guilty of failure to pay a tax, whether it be wilful or not.

1209

The only crime of which the defendant may be found guilty is a wilful attempt to evade or defeat the income tax.

If you find that the defendant had a net income for 1936 upon which some income tax was due, and I believe that is conceded, if you find that the defendant wilfully failed to file an income tax return for that year, if you find that the defendant wilfully failed to pay the tax due on his income for that year, you may, if you find that the facts and cir-

1210

*Charge of the Court.*

cumstances warrant it find that the defendant wilfully attempted to evade or defeat the tax. If you find that the defendant wilfully attempted to evade or defeat the tax, your verdict should be that the defendant is guilty.

The accusation contained in the indictment means that the defendant attempted to defraud the Government of the tax payable on his 1936 income. Unless you find that the defendant intended to defraud the Government of the tax payable upon his 1936 income, you must acquit him.

Before you can find the defendant guilty of the crime charged, you must find that he had a specific wrongful intent, that is, actual knowledge of the existence of the obligation coupled with a wrongful intent to evade.

1211 You have heard considerable testimony concerning the so-called unexplained items aggregating some \$10,000, and you have also heard explanations offered by and in behalf of the defendant. Under the law one is not required to keep books, nor if he does keep books, to enter each and every transaction in those books so as to be in a position to explain them to the taxing authorities; but you have a right to consider the character of the books kept by the defendant and you must decide on the evidence whether such books as were kept or the failure to keep certain books or to make certain entries are merely unintentional error or neglect or whether they are a part of an attempt to defeat or evade the tax.

1212 The mere fact that the defendant received or had certain funds in his possession or bank account does not of itself establish that the funds represented taxable income. However, the Government is not obliged to prove the exact source of income received by the defendant. If on the basis of all the facts and circumstances you believe that all or part of the unexplained items represented income then you may take that fact into consideration in determining whether the defendant wilfully attempted to evade or defeat his 1936 tax.

You recall the testimony with respect to the \$40,000 transaction at the Lawyers Trust Company. It is not disputed that the defendant received \$40,000 in cash of which he delivered \$2,000 to Eddy and \$38,000 he caused to be transported by armored truck to Lynbrook, Long Island, where it was deposited to an old account in his wife's name. Nor is it disputed that the check against which the Lawyers Trust Company paid out the \$40,000 did not bear the defendant's name either on the face or the reverse. That check is in evidence. However, there is testimony that the defendant did endorse another \$40,000 check which he delivered to Kenyon. There is in evidence a photostatic copy of the face of such a check. You have heard the defendant's statement of the reasons which impelled him to conduct that transaction in the manner in which it was transacted.

1214

I charge you that it is not unlawful to conduct business in cash. Nor is it unlawful to deposit funds in an account maintained by one's wife. Nevertheless it is your function to determine whether the facts of that transaction as you find them bespeak an innocent intent or an intent to evade or defeat the tax.

Similarly you should take into consideration the requests for extensions of time, the inquiry from stock brokers, the request for a tax form, together with all the facts and circumstances to the extent that you accept them as true. The weight to be given to each of these, as I have already stated, is for the jury to determine.

1215

Evidence has been presented that defendant's failure to file a return and pay the tax for 1936 was not part of a wilful attempt to evade or defeat the tax but was brought about by his physical and mental condition in 1937. Again I charge you that wilfulness is an element of the crime charged and that the Government has the burden of proving wilfulness beyond a reasonable doubt. It is for you to determine from all the facts and circumstances and the legiti-



mate inferences which may be drawn therefrom whether the defendant's mental condition in 1937 was such that wilfulness to commit the crime charged cannot be ascribed to him. Unless you find beyond a reasonable doubt that the defendant's conduct was wilful, you must acquit the defendant.

In that connection you may consider the defendant's participation in other business enterprises and in other affairs in the light of all of the circumstances and in the light of the medical opinions which have been given to you to the extent that you accept those opinions.

1217 A verdict of guilty cannot be rested, of course, upon mere suspicion or mere probability, but must be founded upon evidence and inferences reasonable or naturally arising from the evidence.

The Court has in the course of its charge made some statements about the evidence and about its tendency as proof. But the jury should understand that it is the exclusive judge of the questions of fact; that its understanding of the testimony and the evidence is controlling and that it should disregard the statements of the Court in respect to the evidence and its tendency, if and wherever its understanding of the evidence differs from that of the Court.

1218 Ladies and gentlemen, the jury, as you know, is composed of twelve. Undoubtedly the verdict should represent the opinion of each individual juror; it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. Each juror should therefore listen, with a disposition to be convinced, to the opinions and arguments of the others. It is not intended that a juror should go to the jury room with a fixed determination that the verdict shall represent his opinion of the case at that moment; nor is it intended that he should elope his



ears to the arguments of other jurors who are equally honest and intelligent with himself. I hope you will make a very genuine effort to arrive at a unanimous verdict.

I have been requested to make certain additional charges. The fact that I make them on request does not mean that they are any the less the law than any of the charges that I have made of my own. I shall charge them because they are the law.

At the defendant's request therefore I charge you as follows:

"8. Wilful failure to file a return and wilful failure to pay the tax on an income are offenses distinct from the wilful attempt to defeat or evade the income tax charged in the indictment." 1220

Similarly on the same request, I charge you as follows:

"19. The evidence that the defendant applied for and obtained extensions of time to file the return on his income for the year 1936, and to pay his tax is evidence, which you must consider in determining whether the defendant wilfully attempted to evade and defeat the income tax."

I need hardly add that the weight of the evidence, as I have already said, is for the jury to decide.

On the same request I charge you as follows:

"20. The evidence that the defendant wrote to brokerage houses for information respecting his accounts so that he could give the Government information is evidence which you must consider in determining whether the defendant wilfully attempted to evade and defeat the income tax"—with the same admonition I have given you before. 1221

On the same request I charge you as follows:

"25. The amount of the tax due must not influence your decision on the question whether the crime alleged has been committed.

"26. It is not your function to determine how much tax is due. It was conceded by the defendant that a tax was due.

"27. The liability of the defendant in a civil proceeding to pay any tax due remains separate and distinct from the issues in this trial, is not affected by this trial, and you must not consider it in determining whether defendant is guilty or not guilty in this case."

As far as the defendant is concerned, all other requests except as to the extent that I have already charged are denied, with the exception of an additional one which I will read in a moment.

1123 Mr. Cahill: I respectfully except to any denials—

The Court: I think you better put on the record a statement indicating which requests.

Mr. Cahill: All right.

The Court: At the Government's request I charge you, not because of the request but because it is the law, as follows:

1224 "18. You are instructed that the question of possible punishment of the defendant, in the event of a conviction is no concern of the jury, and should not in any sense enter into or influence your deliberations. The duty of imposing sentence rests exclusively upon the Court. The function of the jury is to weigh the evidence in the case and determine the guilt or innocence of the defendant solely upon the basis of such evidence. Under your oaths as jurors, you cannot allow a consideration of the punishment which may be inflicted upon the defendant, if he is convicted, to influence your verdict in any way."

The additional request on the part of the defendant is as follows:

"30. The defendant cannot be found guilty of the accusation in the indictment as of any date prior to the expira-

*Charge of the Court.  
Exceptions to Charge.*

1225

tion of the period, for which the Government had extended defendant's time to file his return and to pay his tax, that is the period until and including June 15th, 1937."

Members of the jury, you are at liberty to call for any exhibit that has been offered in this case. If you desire any exhibit, it will be sent to you, if the foreman will write a note to the marshal. If any other questions or other matters come up that require the Court's instructions or assistance, if you will notify the marshal, I will see whether such assistance or information may be given to you in this case.

I appeal to you again to deliberate fairly and impartially and make a genuine effort to arrive at a unanimous verdict. I will note the exceptions to my charge.

1226

Mr. Cahill: I have just a few. I except to the failure to charges Nos. 13 and 17, which really is the same thing that was involved in the motion to dismiss.

The Court: To the extent that I have agreed with these charges, I believe I have charged them. Some of the other requests I have not granted because I do not believe they are the law.

Mr. Cahill: Nos. 17, 18, 21 and 22, which is of a similar character as 23, of the same type, 24.

I believe 28 has been charged in effect.

The Court: To the extent that I wish to charge it.

Mr. Cahill: I except to so much as may not have been charged, but I think substantially it was charged.

1227

No. 29.

And I request you to charge that an affirmative act is necessary to constitute a wilful attempt.

The Court: The exception is noted.

The marshal may now be sworn.

(At 4.13 o'clock P. M. the jury retired to consider their verdict.)

(At 5.25 o'clock P. M. the jury returned to the court room.)

The Court: Members of the jury: I received your request. We shall try to comply with it to the extent that we can. Your request is for all insurance application rejections. Have counsel assembled those?

Mr. Behrens: Yes, your Honor.

The Court: You will have them. You will give them to the foreman before the jury leaves.

1229 Letters to other insurance companies. Those are letters that have been admitted in evidence and were read, or the substance of them was read, or they were read into the minutes. I think they were read, so we would not have to take the original letters but we will read from the minutes. I will ask the reporter to read them.

You request the minute book of National Fund, Part of that minute book is not in evidence and part of it is. Counsel will agree as to the portion that is in evidence and that portion will be delivered to the foreman for the use of the jury.

Letter of the Bureau of Internal Revenue of May 7, 1937. Have you found it?

Mr. Behrens: It is May 15. I think that is the letter.

The Court: Mr. Cahill, do you agree that that is the letter that the jury has in mind?

Mr. Cahill: I think that must be the letter.

1230 The Court: Has the foreman any other information which you think refers to some other letters?

The Foreman: That is clearly the letter.

The Court: You will have all of them that are in court and the letters to which you refer with respect to the insurance company will now be read to you by the reporter.

The Foreman: The letter from the insurance company to Dr. Gilman.

Mr. Cahill: It was read into evidence.

Mr. Behrens: It was read in by the Government, I think.

Mr. Cahill: I think I read it myself, Mr. Reporter. I had it in my hand and read it to you.

(The reporter read to the jury a letter of March 12, 1937, addressed to Dr. Howard Gilman, from the medical director, which was read during the testimony of the witness George W. Hermance.

The Court: Is there any other letter you think the jury requests?

Mr. Cahill: Was there a telegram mentioned?

The Court: You say there is another letter?

A Juror: I do not know whether it is in order, but I think what we would like is when for the first time it was clear to the defendant that he was suffering from heart disease, when he was told by the insurance company.

1232

The Court: Your recollection will have to serve you unless you ask for the reading of any portion of the testimony. That is a matter that was gone into at various times. Your recollection will have to serve unless you want some certain portion read.

A Juror: I suggest that we read the testimony of Dr. Sharpe.

The Court: Is that the wish of the jury?

A Juror: I do not think that is necessary at all, to read the evidence.

The Foreman: I think we can read it during the testimony of the rejections of the company.

1233

The Court: If the jury wants the testimony read, I will order it read. How many of you want it read? What is counsels' judgment in the matter?

Mr. Cahill: Whatever the jury wishes.

The Court: Two of them would like it read. If counsel want it read, if either counsel wants it read, I will have it read to the jurors.



Mr. Cahill: I would not want to express any opinion, under the circumstances.

The Court: I will let the jury go back without reading it and if after some time has been spent and the jury, or the same two, want it read—would like to have the testimony read, will you so indicate and we will have it read. It is the wish of two of you that it be read. But we will give you further opportunity to deliberate and possibly the recollection of the two gentlemen may be refreshed by the others. But nevertheless if after a reasonable interval of time you think that you would like to have it read, so indicate to the marshal, and I will have the testimony read to you.

1235

Mr. Behrens and Mr. Cahill, you have collected the exhibits pursuant to the request?

Mr. Cahill: Yes.

Mr. Behrens: Yes.

The Court: Will you deliver them to the foreman?

Mr. Cahill: We cannot find the rejections.

The Court: That request cannot be complied with.

Mr. Cahill: We could not pick it out.

The Court: The jury will have to rely on its recollection of the evidence.

(At 5.35 o'clock P. M. the jury again retired and returned to the court room at 6.05 o'clock P. M.)

The Clerk of the Court: Mr. Foreman, have you agreed upon a verdict?

1236

The Foreman: We have.

The Clerk: How say you?

The Foreman: We find the defendant guilty as charged.

The Clerk: Listen to your verdict as it stands recorded. You say you find the defendant guilty as charged and so say you all?

The Jurors: We do.

The Court: Do you wish the jury polled?

Mr. Cahill: No, your Honor.



If your Honor please, as you undoubtedly realize, the question of law which I may wish to argue a little more fully—I think it is a serious question and therefore I would like to waive the motion of setting aside the verdict until I have had an opportunity to prepare on it.

The Court: Yes, I believe there is a serious question of law in the case and I agree that if we were in the State court, a certificate of reasonable doubt ought to issue. Unless there is a serious objection on the part of the District Attorney to the request, I will grant the request now.

Mr. Behrens: I have no objection to that request.

The Court: What time would you like to fix for your motion?

Mr. Cahill: We must consult your Honor's engagements.

1238

The Court: I will be in the motion part next week.

Mr. Cahill: I have a couple of things in the State court Monday and Tuesday. If it could go beyond Tuesday or Wednesday, I would appreciate it.

The Court: I have no objection your arguing it on the regular motion day, or you could take it up at the close of the calendar.

Mr. Cahill: Would Tuesday afternoon be all right, your Honor? Is that convenient?

The Court: No, it does not make any difference to me whether I hear one motion or another.

Mr. Cahill: Monday would be all right.

The Court: Monday afternoon will be all right. I will hear it in chambers Monday afternoon.

1239

Mr. Cahill: What time do you suggest?

The Court: 3 o'clock.

Mr. Behrens: Will your Honor adjourn sentence until that time?

The Court: Yes, sentence will be adjourned to that time and the defendant will continue on bail, I presume.

Mr. Behrens: I do not have any objection to that, your Honor.

(Adjourned to August 18, 1941, at 3 P.M. in chambers.)

1240

*Motion to Set Aside.  
Sentence.*

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New York, August 18, 1941.  
3 P. M.

The Court: Mr. Cahill, you may proceed.

Mr. Cahill: If the Court please, I move to set aside the verdict of the jury upon the ground that it is contrary to law, contrary to the evidence, and on all the exceptions taken at the trial. I also move in arrest of judgment upon the ground that the indictment fails to state facts sufficient to constitute a crime under the laws of the United States.

The Court: The motions are denied.

1241

Mr. Cahill: I except.

Mr. Behrens: The Government moves for sentence.

. . . . .

The Court: I shall sentence you to a year and a day in a penitentiary to be designated by the Attorney General. I shall not impose a fine for the reason that I believe that the taxes already due with interest and penalties will constitute as heavy a burden as you are liable to be able to carry.

I have heretofore indicated that I would continue your bail after sentence if you so wish pending an appeal and am prepared to do so now.

1242

Mr. Cahill: We have prepared a notice of appeal which we will file today and therefore I make application for the continuance of the defendant on bail pending the determination of his appeal.

The Court: I think this defendant will respond to the mandate of the Court and I will continue bail in the sum of \$1,000, that bail to be rewritten to cover the appeal.

**Judgment.**

At a Stated Term of the District Court of the United States of America, for the Southern District of New York, held at the United States Court House, in the Borough of Manhattan, City of New York, on August 18, 1941.

Present: THE HONORABLE SIMON H. RIFKIND, *Judge*.

THE UNITED STATES OF AMERICA

VS.

MURRAY R. SPIES.

C. 109-303

U. S. Criminal Code,  
Section 145b,  
Title 26, U. S. C.

Wilfully attempting  
to evade and defeat  
income tax for 1936.

1244

On motion of the United States Attorney, Ordered Sentence.

IT IS THEREUPON ORDERED AND ADJUDGED that the above named defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a penitentiary for and during the term and period of one year and one day.

Bail fixed at \$1,000 pending appeal.

Defendant paroled in custody of his attorney until Aug. 20, 1941, at 4 P. M. to give bail.

SIMON H. RIFKIND 1245

Filed Aug. 18, 1941,  
U. S. District Court for the  
Southern District of New York.

1246

### **Extensions of Time.**

The time of the appellant to settle and file his bill of exceptions was duly extended by appropriate orders to April 3, 1942, and the bill of exceptions is being settled and filed within the time extended.

### **End of Bill of Exceptions.**

1247

Inasmuch as the foregoing is not a part of the record, this bill of exceptions is tendered by the defendant-appellant, Murray R. Spies, to be made part of the record of this cause.

DAVID V. CAHILL,  
Attorney for Defendant-Appellant.

### **Stipulation as to Bill of Exceptions.**

**UNITED STATES DISTRICT COURT,**

**SOUTHERN DISTRICT OF NEW YORK.**

1248

**UNITED STATES OF AMERICA,**

**against**

**MURRAY R. SPIES,  
Defendant-Appellant.**

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the foregoing Bill of Exceptions is correct in every particular and that with the exhibits, all of which are made part of the Bill of Exceptions and which

*Stipulation as to Bill of Exceptions.*

1249

are being submitted to the Circuit Court on the argument either in their original form or in the form of printed or photostatic copies, it contains all the evidence in this cause, and that it may be duly signed, settled and allowed.

Dated, New York, N. Y., April 2, 1942.

MATHIAS F. CORREA,  
United States Attorney for the  
Southern District of New York.

DAVID V. CAHILL,  
Attorney for Defendant-Appellant. 1250

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**Certificate and Order Settling Bill of Exceptions.**

THIS IS TO CERTIFY that the foregoing Bill of Exceptions tendered by the appellant, is correct in every particular and that with the exhibits, which are to be submitted to the Circuit Court of Appeals on the argument, either in their original form or the form of printed or photostatic copies, it contains all of the evidence in this cause and the said exhibits are hereby made part of this Bill of Exceptions and the said Bill of Exceptions is hereby settled and allowed and made part of this cause.

1251

Dated, April , 1942.

SIMON H. RIFKIND,  
United States District Judge.

1252

**Notice of Appeal.****UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.**

<p><b>UNITED STATES OF AMERICA,</b>  <b>Appellee,</b>          against  <b>MURRAY R. SPIES,</b>  <b>Appellant.</b></p>
--

1253

**Name and Address of Appellant:** Murray R. Spies, 401 S  
 165th Street, Flushing, L. I.

**Name and Address of Appellant's Attorney:** David V.  
 Cahill, Esq., 11 Broadway, New York, N. Y.

**Offense:** The appellant was convicted of a violation of  
 the following Statute contained in an indictment of one  
 count: Unlawfully attempting to defeat and evade the  
 income tax laws in violation of U. S. C. Title 26, Section  
 145B (Act of May 10, 1934), 48 Stat. 724.

**Date of Judgment:** August 18, 1941.

**Description of Judgment and Sentence:** Imprisonment for  
 a year and a day with no fine.

**Place of Confinement:** To be designated by the Attorney  
 General of the United States.

1254

I, the undersigned, the Appellant above named, hereby  
 appeal to the United States Circuit Court of Appeals for  
 the Second Circuit from the judgment above mentioned  
 on the grounds set forth below.

Dated, August 18th, 1941.

**MURRAY R. SPIES,**  
**Appellant**



### Grounds of Appeal.

1. The trial court erred in denying the motion to dismiss the indictment made at the trial upon the ground that the indictment failed to allege a crime against the laws of the United States.

2. The trial court erred in receiving evidence of an irrelevant nature relating to the business activities of the defendant not related to the matters alleged in the indictment, which occurred during the period prior to June 15th, 1937.

3. The trial court erred in receiving evidence of an irrelevant nature relating to the business activities of the defendant not related to the matters alleged in the indictment, which occurred after June 15, 1937.

1256

4. The trial court erred in receiving evidence as to the amount of defendant's income for the year 1936, although a taxable income had been conceded by the defendant.

5. The trial court erred in receiving evidence as to the amount of tax alleged to have been due from the defendant on his income for 1936, although the defendant had conceded that there was a tax due for that year.

6. The trial court erred in admitting in evidence over objection and exception of the defendant a check for \$40,000.00 alleged to have been made by Donald F. Kenyon and Kenyon and Company, which was not connected in any way with the defendant.

1257

7. The trial court erred in denying the motion to dismiss the indictment made at the close of the Government's case.

8. The trial court erred in denying the motion to dismiss the indictment made at the close of the entire case upon the ground that the evidence tended to establish only a failure to file an income tax return and a failure to pay a tax thereon and did not establish the crime alleged in the indictment, that is to say, a willful attempt to defeat and evade the income tax laws.

9. The trial court erred in instructing the jury that no affirmative or positive act was required on the part of the defendant to prove a willful attempt to defeat and evade the income tax laws.

10. The trial court erred in receiving over objection and exception of the defendant evidence as to items of alleged unexplained income aggregating over \$10,000.00 without any proof that the said items did in fact represent income.

**Stipulation and Order as to Exhibits.****UNITED STATES CIRCUIT COURT OF APPEALS****FOR THE SECOND CIRCUIT.****UNITED STATES OF AMERICA****against.****MURRAY R. SPIES,  
Defendant-Appellant.**

It IS HEREBY STIPULATED AND AGREED that the exhibits, being part of the Bill of Exceptions herein, because of their size and number, shall not be printed in the transcript of the record, but shall be submitted to the Court on the argument of this appeal in their original form or with printed or photostatic copies for the consideration of the Court.

Dated, New York, N. Y., February 4, 1942.

**MATHIAS F. CORREA,**  
United States Attorney for the  
Southern District of New York,  
By **EDWARD J. BEHRENS,**  
Asst. U. S. Attorney.

**DAVID V. CAHILL,**  
Attorney for Defendant-Appellant.

So Ordered:

**CHARLES E. CLARK,**  
U. S. C. J.

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

**against**

**MURRAY R. SPIES,**  
Defendant-Appellant.

1265 The defendant-appellant, Murray R. Spies, hereby makes the following assignment of errors:

1. The Court erred in refusing to instruct the jury as requested that they might not find the defendant guilty of a willful attempt to defeat and evade the income tax, if they found only that he willfully failed to make a return of taxable income and willfully failed to pay the tax on that income.
2. The Court erred in declining to instruct the jury as to the meaning of the word "willful".
3. The Court erred in declining to instruct the jury as to the meaning of the word "attempt".
- 1266 4. The Court erred in declining to instruct the jury as to the meaning of the word "evade".
5. The Court erred in declining to instruct the jury that they must acquit the defendant unless they find that he with evil purpose tried by artifice, dexterity, trick, address or ingenuity to cheat and defraud the Government of the tax.

6. The Court erred in declining to instruct the jury that there was no evidence of any scheme or artifice by the defendant to evade or defeat the income tax laws.

7. The Court erred in refusing to instruct the jury that before they could find the defendant guilty of the accusation in this case they must find that he had a specific wrongful intent, that is, actual knowledge of the existence of the obligation coupled with a wrongful intent to evade it.

8. The Court erred in refusing to instruct the jury that if they found defendant failed to report his income for 1936 and failed to pay the tax thereon only because of carelessness they must find him not guilty of the accusation in the indictment.

1268

9. The Court erred in declining to charge the jury that the defendant could not be found guilty of a willful attempt to defeat and evade the income tax if they found that he intended before the investigation began, at some time to file his report and pay his tax.

10. The Court erred in failing to instruct the jury that the evidence that defendant applied for and obtained extensions of time to file his return on his income and to pay his tax is evidence that must be considered in determining whether the defendant willfully attempted to defeat and evade the income tax.

1269

11. The Court erred in refusing to instruct the jury that if they found defendant was suffering from a disease or physical or mental condition which prevented or interfered with the exercise of his will power and caused him to neglect and delay the filing of a report and the payment of the tax on his income, they must find him not guilty.

12. The Court erred in refusing to instruct the jury that if they found defendant was suffering from some disease or condition which caused him to procrastinate and to put over and delay action on matters of importance, or to lose sight of their importance and that this condition caused him to neglect the filing of a report and the payment of the tax on his income, they must acquit him.

1271 13. The Court erred in refusing to instruct the jury that if they found the defendant had the mental capacity to report his income, but because of the condition from which he was suffering had not the power of will to prepare and file his return, they must find him not guilty.

14. The Court erred in refusing to instruct the jury that if they found the defendant had the mental capacity to report his income tax, but was suffering from an inhibition, which prevented him from exercising his will to do so, they must find him not guilty.

15. The Court erred in refusing to instruct the jury that if they found the failure of the defendant to file his return and pay his tax was due to procrastination, negligence or carelessness, they must acquit him.

1272 16. The Court erred in refusing to instruct the jury that the statute, which is in derogation of the common law, must be strictly construed against the Government and in favor of the taxpayer.

17. The Court erred in admitting in evidence Government's Exhibits 17 and 17(a), being photostatic copies of an income tax return alleged to have been made by defendant-appellant for the year 1935 (pp. 41-43).



18. The Court erred in admitting in evidence Government's Exhibits 24, 25, 26, 27, 28 and 29, being check books and bank statements in the name of "Marie V. Spies" (pp. 64-64).

19. The Court erred in admitting in evidence Government's Exhibit 30, being a voting trust agreement with respect to Universal Shares, Ltd. (pp. 67-69).

20. The Court erred in admitting in evidence Government's Exhibits 32 to 38, including 37(a), and Government's Exhibits 40 to 43 and Government's Exhibits 45 to 46, being transcripts of various bank, stock and brokerage accounts in the name of others than the defendant-appellant (pp. 72-75, 77-80).

1274

21. The Court erred in admitting in evidence Government's Exhibit 47, being a page of the general ledger of the United Sponsors Co. (pp. 82-84).

22. The Court erred in admitting in evidence Government's Exhibit 48, being a schedule purporting to show calculations by the witness Reighley as to income of the defendant-appellant based on assumption as to the various items included (pp. 84-86).

23. The Court erred in admitting in evidence Government's Exhibit 49, being a computation of taxes alleged to be due from defendant-appellant, based on assumptions as to numerous items of income (pp. 87-88).

1275

24. The Court erred in sustaining an objection by Government counsel to the following question:

"Q. Did you talk to Mr. Deneen or Mr. Reighley or any other representative of the government about any plan to pay the taxes on your 1936 income?" (p. 154).

25. The Court erred in overruling an objection made on behalf of defendant-appellant to the following question:

"Q. If I showed you a copy of your tax return for 1935 would it help to refresh your recollection as to exactly what you had gotten from the companies in that year?" (p. 180).

26. The Court erred in admitting in evidence Government's Exhibit 57, being an application to the Prudential Insurance Company dated March 4, 1931, by defendant-appellant for insurance on his life (pp. 206-208).

1277 27. The Court erred in admitting in evidence Government's Exhibit 96, being a letter purporting to have been written by appellant dated August 26, 1937 (p. 304).

28. The Court erred in admitting in evidence Government's Exhibit 100 (p. 318).

29. The Court erred in denying the motion to dismiss the indictment upon the ground that it failed to state a crime (p. 318).

30. The Court erred in receiving evidence relating to the business activities of the defendant after June 15, 1937, which were not relevant to the matters alleged in the indictment.

1278

31. The Court erred in receiving evidence relating to the business activities of the defendant prior to June 15, 1937, which were not relevant to the matters alleged in the indictment.

32. The Court erred in denying the motion made on behalf of defendant-appellant to dismiss the indictment at the close of the Government's case (pp. 128-133).

*Assignments of Error.*

1279

33. The Court erred in denying the motion made on behalf of the defendant-appellant to dismiss the indictment made at the close of the entire case (p. 390).

Respectfully submitted,

DAVID V. CAHILL,  
Attorney for Defendant-Appellant.

**Stipulation as to Record.**

UNITED STATES DISTRICT COURT,

1280

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

against

MURRAY R. SPIES;  
Defendant-Appellant.

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated, New York, N. Y., April , 1942.

1281

MATHIAS F. CORREA,  
United States Attorney for the  
Southern District of New York.

DAVID V. CAHILL,  
Attorney for Defendant-Appellant.

1282

**Clerk's Certificate.**

**UNITED STATES DISTRICT COURT,**  
**SOUTHERN DISTRICT OF NEW YORK.**

**UNITED STATES OF AMERICA**

**against**

**MURRAY R. SPIES,**  
**Defendant-Appellant.**

1283 I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said District Court to be hereunto affixed at the City of New York, in the Southern District of New York, this day of April, in the year of our Lord, one thousand nine hundred and forty-two, and of the Independence of the said United States, the one hundred and sixty-sixth.

GEORGE J. H. FOLLMER,

(Seal)

Clerk.

1284

[fol. 429] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT, OCTOBER TERM, 1941

No. 280

(Argued May 5, 1942. Decided June 19, 1942)

UNITED STATES, Appellee,

v.

MURRAY R. SPIES, Appellant

On appeal from a judgment of conviction of the District Court for the Southern District of New York upon an indictment for attempting to defeat and evade an income tax under Section 145(b), Title 26, U. S. Code.

Before L. Hand, Augustus N. Hand and Chase, Circuit  
Judges

David V. Cahill for the appellant.

Edward J. Behrens for the appellee.

Per CURIAM:

The only question upon this appeal of enough importance to demand notice is the judge's charge, which followed the interpretation put upon § 145 (b) in *O'Brien v. United States*, 51 Fed. (2d) 193 (C. C. A. 7), which we followed in *United States v. Miro*, 60 Fed. (2d) 58. We all agree that we must continue so to construe the section until the Supreme Court decides otherwise; but Judge L. Hand wishes it to appear that as a new matter he would decide otherwise, and would reverse this conviction in accordance with the reasoning of Judge Alschuler's dissent in *O'Brien v. United States*, *supra*, which appears to him unanswerable.

Conviction affirmed.

[fol. 430] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND  
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of July, one thousand nine hundred and forty-two.

Present Hon. Learned Hand, Hon. Augustus N. Hand,  
Hon. Harrie B. Chase, Circuit Judges

UNITED STATES, Plaintiff-Appellee,

v.

MURRAY R. SPIES, Defendant-Appellant

Appeal from the District Court of the United States for the  
Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 431] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States v. Murray R. Spies. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 6, 1942. D. E. Roberts, Clerk.

[fol. 432] UNITED STATES OF AMERICA,  
Southern District of New York:

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 431, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States,



Plaintiff-Appellee, against Murray R. Spies, Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 28th day of July, in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the said United States the one hundred and sixty-seven.

D. E. Roberts, Clerk.

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[fol. 433] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1942

No. 278

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3379)

FILE COPY

FILED

AUG 3 1912

CHARLES ELMORE CROSBY

CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1912

No. **278**

MURRAY R. SPIES,

against

UNITED STATES OF AMERICA,

*Petitioner,*

*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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✓  
DAVID V. CAHILL,  
*Attorney for Petitioner.*

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IN THE

**Supreme Court of the United States**

**OCTOBER TERM 1942**

**MURRAY R. SPIES,**

**Petitioner,**

**against**

**UNITED STATES OF AMERICA,**

**Respondent.**

**No.**

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

*To the Honorable the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of the  
United States:*

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered July 6, 1942, affirming a judgment of conviction in this criminal cause.

**Opinions Below**

There was no opinion in the District Court.

The opinion of the Circuit Court of Appeals has not yet been reported, but it is printed at the end of the record submitted herewith. The numbers of the pages are not yet available.

## **Jurisdiction**

The jurisdiction of this court is invoked under Section 24(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Sec. 347, Title 28 U. S. C.).

## **Questions Presented**

1. Whether the wilful omissions (a) to file a return of income and (b) to pay a tax thereon, defined as misdemeanors in Section 145(a) of the Internal Revenue Law, of themselves, without the addition of any other element, constitute the felony of attempting to defeat and evade the income tax law, defined in Section 145(b) of the same law.

2. Whether the word "attempts" in Section 145(b) is used in its common law significance of positive and affirmative acts, or is intended by Congress in this statute to have a different and peculiar meaning, including not only positive acts, but also the mere omissions defined in Section 145(a).

3. Whether Section 145(b), if construed as intended to give the word "attempts" a meaning different from its meaning at common law, is not unconstitutional for uncertainty of definition.

4. Whether the trial court did not err in failing to instruct the jury on the effect of petitioner's mental and physical condition on his will power and the wilfulness of his alleged offenses.



### **Statute Involved**

**Section 145 of the Revenue Act of May 10, 1934—  
Penalties.**

(a) Any person required under this chapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who wilfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this title, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs. (May 10, 1934, 11:40 a. m., c. 277, Section 145, 48 Stat. 724.)

### Statement

The indictment consisted of a single count, alleging that the defendant had wilfully attempted to defeat and evade the income tax law with respect to his income for the calendar year 1936. The petitioner is a lawyer, admitted to practice before the bar of the State of New York. He began his career as an office boy in the office of a distinguished firm in the City of New York (R. p. 934). In 1933 he became associate counsel to a corporation known as Universal Shares. From that time until 1936 he acted as counsel and as trustee for a number of distributing companies for investment trusts, at one time in association with General John F. O'Bryan and also acted as director in one or two smaller companies with which he was connected (pp. 135-136). Mr. Spies received commissions from one or more of the distributing companies, which sold and distributed the stock of investment trusts. By written agreement, on July 11, 1936, he resigned and transferred control of the various distributing corporations to the Weil Management Company and one Kenyon for the sum of \$40,000, of which \$2,000 was paid by him to another person and \$38,000 was retained for himself. This \$38,000 plus approximately \$2,000 additional income in the form of salary, made up the taxable income for the year 1936, which was the basis of the prosecution.

Under circumstances, which will be recited briefly later, Spies failed to file a return for the year 1936 and failed to pay the tax, but was not prosecuted for these misdemeanors, which are defined in Section 145(a). There is, of course, a question whether under the circumstances the delinquency was wilful. The record shows that Spies consulted an accountant named Rosenberg, who became a Government witness, in connection with his return and the payment of his tax for the year in question (pp. 44-45). On behalf of the petitioner and at his request Rosenberg filed with the Collector of Internal Revenue on March 11,

1937, an application for an extension to file his return. The extension to April 15, 1937, was granted (p. 45). Subsequently on behalf of Spies, Rosenberg again applied for an extension to May 15th and another extension until June 15th was granted (p. 45). On May 15, 1937, the petitioner wrote another letter to the Collector of Internal Revenue in which he stated that he did not know whether or not his accountant had yet filed the return—meaning, of course, a tentative one. For several weeks prior to June 15, 1937, and on that day and subsequent thereto Spies was actually confined to bed under the care of at least two physicians. The correspondence with respect to these extensions is in evidence as Government's Exhibits 8 to 15. Apparently on his own initiative and as a matter of routine Rosenberg also filed on or before March 15, 1937, a tentative return for Spies (Government's Exhibit 18). It contained the word "none" in the space allotted for income and other figures. The accountant testified that in his practice that explanation was used when it was not known how much income there was or how much tax was due (p. 50). The accountant specifically remembered that Spies told him that he had an income for the year 1936 (fol. 150). Rosenberg did not know who signed this tentative return (p. 49). He did not recall any conversation with Spies about writing the word "none" on the tentative return. Rosenberg said that it was possible that Spies may have asked him if the income was so much, how much the tax would be (p. 53).

There was proof that Spies for some years had suffered from a mental and physical condition, which may have contributed to his default in reporting his income and paying his tax. Until the year 1937 Spies had engaged in various activities relating to the corporations in which he was interested, but most of the activities in all probability were of the usual corporate character such as attendance at meetings of directors, there being other directors present. There was evidence also that other persons were employed to handle the affairs of these corporations, such as

investment counsel, legal counsel and managers of various operations. Nevertheless, during the year 1937 and for some time prior thereto and for several years thereafter, Spies was in a serious mental condition and had a physical condition, the seriousness of which was undoubtedly greatly exaggerated in his mind. During the years 1936 and 1937 he consulted from twelve to fifteen physicians. One of them, Dr. Gilman, treated him for a period of years. He found Spies suffering from a condition described technically as "tachycardia". It may be described in simple language as a condition of abnormally rapid heart action. He also had high blood pressure (p. 191). Beginning with the year 1931 Spies' applications for life insurance were rejected by seven or eight different companies. In fact, with the exception of one company, which offered insurance to him in 1932, on condition that he would be rated nine or ten years beyond his actual age, his applications were uniformly denied between 1931 and 1937 (p. 136). In February or March, 1937, in one of the life insurance companies' reports, which was brought to Spies' attention, it was suggested that he had a coronary condition (p. 136). As a result of this he feared that he was going to drop dead at any time (p. 191). He called one of the physicians frequently on the telephone and made personal visits to him for examination. When he was about to close the \$40,000 transaction in 1936 he called upon Dr. Sharpe to determine whether he was physically capable of going through with the transaction and went through with it only after receiving the doctor's assurance that he could do so (pp. 140-141).

Appellant's disease was diagnosed by Dr. Gilman as "fear psychosis", or "neuro-circulatory asthenia" (p. 192). This diagnosis was confirmed by Dr. Stephen P. Jewett, an expert of high standing in the field of psychiatry and neurology (pp. 226-227). Appellant would not go into subways and was afraid that he was going to jump out of windows (p. 137). He was reluctant to go into restaurants (p. 138). This condition was acute during the year 1937.

There was nothing to indicate that he feigned illness or phobias, or that his condition was conveniently timed. The effect was primarily on his will power (pp. 231-232). Procrastination was one of the characteristics. Even though the intellectual faculties remained fairly clear and active, the condition would naturally interfere with his will power to do what should be done (p. 233). Requests for instructions to the jury on the tests to be applied to this important factor in the case were filed in the trial court (R. fols. 1269-1271, 1181, 1182) but were declined and the subject was not discussed in the court's instructions except in general terms (R. fols. 1215-1216). A specific exception was taken to the refusal to instruct the jury as requested on the subject (fol. 1226).

There were no fraudulent acts and no positive or affirmative acts of concealment or deception on the part of the petitioner alleged or attempted to be proved. The sole circumstance which the Government emphasized in this connection was that Spies had taken the \$40,000 in cash at the time when he transferred control of the distributing corporation. The importance of this circumstance has been unduly emphasized throughout this cause. The fact appears to be that there were two checks at the time of the closing of the transaction, one of which Spies never saw, and which was drawn to the order of Kenyon. The other was a check made payable to Spies and endorsed by him on the back. This was the one which he was required to endorse before the cash was turned over to him (p. 113, fols. 338-339). A photostatic copy of this latter check was produced and marked "Exhibit B". For some reason only the face of this check was photostated by the Government and the Government did not produce the back of the check, which bore the endorsement of Spies. Reighley, a Government accountant, who was a witness at the trial, stated that he had seen this entire check and that it was an exhibit before the Securities and Exchange Commission in a proceeding before that body. He did not know where that check was (p. 113, fol. 339). Spies, testifying on his



own behalf, stated that he wanted the check cashed, because it was on a New Jersey bank and he was delivering the closing papers at the time (p. 143). He also stated that he never had a \$40,000 transaction before in his life. For that reason he called an armored car in his own name which came to the place of closing, the Lawyers Trust Company, and paid for its use. The money was taken to Lynbrook, where his home was, and deposited in an old established account of his wife, Marie V. Spies, in trust for his son, who bore the same name as himself, Murray R. Spies, Jr.

After receiving the money and in the month of July or August, 1936, petitioner invested \$25,000 in an annuity in his own name with the Equitable Life Assurance Society (p. 144). He also made improvident investments of his 1936 income, which by the Summer of 1937 had involved him in serious losses and by the end of that year had wiped out his assets including his recently acquired fortune. In 1936 he had undertaken on his own resources to develop an investment fund program including two corporations. His investment in this business was contracted for in 1936 and, in the main, made during the year 1937. In order to keep up with the commitments on his new investment he first borrowed \$12,500 from the Manufacturers Trust Company with his annuity as security (pp. 54-55). Subsequent loans in the year 1937 brought the total borrowed on the security of his annuity policy to the sum of \$22,691.50. The annuity policy was sold by the pledge to pay the indebtedness and the balance remaining out of his annuity as a result of unfortunate investments amounted to \$718.98. He had previously bought a home for his wife and children. Foreclosure proceedings were begun on his home, but by borrowed money he managed to save it for the time being and then rented the house (pp. 153-154).

By the end of December, 1937, the greater part of the one big fee which he had received in his life, \$40,000, "was completely gone" (p. 157). The investment company proposition, which he attempted with his limited means to



finance, failed (ibid.). He then went to work as a stenographer.

At the outset of the trial it was conceded that he had an income of approximately \$40,000 for the year 1936 and that there was due as tax upon the income approximately \$6,000 (p. 16). There was, therefore, no issue remaining on the question whether there was a taxable income. Nevertheless, the Government attempted to prove a larger amount than the amount conceded and a larger tax due thereon. For the sake of brevity doubtful items included as income will not be discussed. It will suffice to say that the Government investigators arbitrarily treated as income any items which by any stretch of the imagination could be placed in that category including many obvious duplications (pp. 108-109). In one instance Spies definitely informed the Government accountant that a certain \$1,500 deposited was money obtained from his brother-in-law. Without examining the brother-in-law or investigating further the Government agents included the item as unexplained income. Much of the testimony relating to this unexplained income was entirely immaterial, could serve no purpose except to introduce an unfavorable atmosphere and will not be discussed further here, because it would not be helpful to the court in considering the questions presented.

### **Reasons for Granting the Writ**

1. The decision of the Circuit Court of Appeals involves the construction of a statute of wide application, which has never been passed upon by this court. The brief opinion of the Circuit Court of Appeals indicates that the judges below affirmed the judgment of conviction only because of a prior decision in that court, and they felt that they must continue so to construe the section "until the Supreme Court decides otherwise". (See opinion at the end of the record.) Judge Learned Hand, one of the

judges on the appeal, states that he believes the dissenting opinion of Judge Alschuler in the case of *O'Brien v. United States*, 51 Fed. (2d) 193, 198 is unanswerable. That opinion holds that proof of the felony defined in Section 145(b) is not made out by proving simply that one has failed to report his income and failed to pay the tax within the meaning of Section 145(a). The opinion of the court below in the case at bar practically invites review by this court for the purpose of settling the law. That the statute is of wide application is obvious. The essence of the question presented is whether, assuming the wilfulness of the omissions to file a return and pay a tax, these misdemeanors as defined in Section 145(a) are of themselves and without any additional element sufficient to constitute the felony defined in Section 145(b).

The fundamental question here posed is presented in various forms in the assignment of errors dealing with failure of the court to instruct the jury and denials of the motions to dismiss the indictment, Errors 1-10, 29, 30 and 31 (R. pp. 422-423, 426).

2. The construction of the word "attempt" in the decision below is in conflict with the decision of various states throughout the union and with the common law. When not precisely defined by statute, the word "attempt" has always been given its common law meaning as signifying a positive or affirmative act and not a mere omission.

3. If the word "attempt" in Section 145(b) is construed to include a mere failure to pay a tax or to report as income, there being no such meaning expressed in the terms of the statute itself, the statute is unconstitutional, because it is vague, indefinite and uncertain.

4. Since there was evidence of a mental and physical condition affecting the will power of the defendant and, therefore, directly bearing on the question of wilfulness of his act, the trial court was bound as a matter of law to give adequate instruction as to the tests by which the jury might determine the effect of his condition on the question of wilfulness.

## ARGUMENT

The misdemeanors defined in Section 145(a) of the Revenue Act of May 10, 1934, do not constitute the felony defined in Section 145(b), and the evidence offered, tending to prove the commission of the misdemeanors, was not sufficient to establish the felony.

It is not conceded that petitioner committed the misdemeanors defined in Section 145(a). At the outset of his trial petitioner through counsel did concede that he had a taxable income of approximately \$40,000 and that there was a tax of approximately \$6,000 due thereon. However, the wilfulness of his omissions was not conceded, but that question is unimportant here, because the Government failed to prosecute petitioner for the misdemeanors. Instead they attempted to prove the felony by evidence which, assuming wilfulness, would have established only the misdemeanors. The precise point involved in the present cause was stated with perfect clarity by Judge Alschuler in his dissenting opinion in *O'Brien, v. United States*, 51 Fed. (2d) 193, 198:

"I cannot bring myself to believe that it was the intent of Congress by paragraph (a) to constitute the willful failure (1) to pay, (2) to make return, (3) to keep records, or (4) to supply information, misdemeanors subject to the prescribed penalties, and then by paragraph (b) to make the very same failures, without the remotest additional element, felonies subject to the penalties as therein specified" (p. 198).

Further, Judge Alschuler said:

"Plainly this legislation contemplates that attempt includes something which mere failure or omission does not. That something in my judgment is some affirmative act. Conduct which is wholly and only an omission as defined in (a) falls short of being an attempt as defined in (b). Thus while there is here

present in the indictment and in the proof the willful *omission* of (a), there is entirely wanting the affirmative act to constitute the *attempt* which in my judgment is of the gist of (b). If paragraph (a) made the willful failure to make return a misdemeanor, it is hardly conceivable that Congress intended to make the very same willful failure to make the return a felony" (p. 198).

It was contended on behalf of petitioner in the court below that the logic of this argument is unanswerable and Judge Learned Hand, while finding himself obliged to concur in the affirmance of the conviction below, stated also that the reasoning of the dissenting opinion in the *O'Brien* case appeared to him to be unanswerable.

Apparently the sole obstacle to reversal of the conviction in the court below was the decision of the same Circuit Court of Appeals in *United States v. Miro*, 60 Fed. (2d) 58. In that case the court conceded expressly that the mere omission to file a return and pay a tax would not amount to an attempt at common law. But it was argued that for some reason offenses under the Internal Revenue law were to be treated differently from others. The sole suggested reason of the court for that assumption is that the Revenue Act created an affirmative duty of reporting the income and paying the tax and that, therefore, this purely negative thing becomes positive and affirmative and the omission becomes something more than a mere omission.

It was also argued in that opinion that the use of the words "in any manner" indicates an intention to cover all possible methods of evasion and not to require "specific means" as an "exclusive method of such evasion". It would seem that this subject does not bear any relation to the precise point now under consideration. In the misdemeanor statute Congress was definite and specific, because the omissions could be readily defined in Section 145(a). Congress could find no language that would be comprehensive of all the means and manners of evasion

possible to a taxpayer and, therefore, was obliged to use general terms in 145(b). There is no reason for assuming that by these general terms Congress intended to include the specific omissions in Section 145(a), which it had already defined. It may be noted that of the judges who decided the *Miro* case only one participated in the decision of the case at bar.

The word "attempt" implies an act, something positive, not a mere omission.

*Burton v. State*, 62 So. 394, 395, 8 Ala. App. 295.

The word "attempt" means an act intended to effect the crime.

*Tharpe v. State*, 30 S. W. (2d) 865, 182 Ark. 74, 79;

*People v. Anderson*, 37 P. (2d) 67;

*Hammond v. State*, 171 S. E. 559, 47 Ga. App. 795;

*Alford v. Commonwealth*, 42 S. W. (2d) 711, 240 Ky. 513;

*State v. Lourie*, 12 S. W. (2d) 43;

*State v. Hudson*, 151 A. 562, 103 Vt. 17.

The word "attempt" implies both purpose and effort.

2 *Bishop New Cr. Prac.*, 4th Ed., Sec. 80.

Some act is necessary.

*State v. Thompson*, 118 Kan. 256, 234 P. 980.

*United States v. Quincy*, 31 U. S. 445, 465, 6 Pet. 445, defines the word as follows:

"To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress toward it. Any effort or endeavor to effect it will satisfy the terms of the law."

The essentials of the felony described in Section 145(b) have never been clearly defined. The language of the statute is not self-definitive. For definition of the word



"attempt" resort must be had to the common law. There is no other source from which a definition could be drawn under our law and no other means by which the language used could be interpreted and defined.

It may be added that the courts in several instances have declared that the misdemeanors defined in Section 145(a) are different from the felony defined in Section 145(b).

*United States v. Capone*, 93 Fed. (2d) 840, 841;

*O'Brien v. United States*, 51 Fed. (2d) 193, 196.

In the *O'Brien* case, *supra*, the court affirmed a judgment of conviction for both the misdemeanor of failing to make a return and the felony of wilfully attempting to defeat and evade the tax. The majority conceded this proposition:

"The offense of willful failure to file an income tax return is not the same as a willful attempt to evade and defeat an income tax."

If the construction of the statute made below is allowed to stand anyone who omits to pay \$1 tax may be held to have committed both the felony and the misdemeanor by the single omission of duty. The cases ordinarily prosecuted under this felony statute heretofore involved dishonest books, false entries in books, false income tax returns and various schemes and conspiracies, by which the Government would be prevented from discovering the taxpayer, his income and his tax liability. The felony statute has never been held to include a citizen like petitioner, who made himself known as a potential taxpayer by obtaining extensions of time to file his return from the Collector of Internal Revenue and who did no act of deception or concealment to cover up his liability or his property. If the statute were intended by Congress to embrace such cases clear warning of its intention must be given in the statute itself.

*Crooks v. Harrelson*, 282 U. S. 55, 61;

*Crawford on Statutory Construction*, Sec. 242, p. 472;



*McBoyle v. United States*, 283 U. S. 25, 27;

*United States v. Merriam*, 263 U. S. 179, 187-188;

*Partington v. Attorney General L. R.*, 4 H. L. 100,  
122.

In *Crooks v. Harrelson*, 282 U. S. 55, 61, a civil tax case, this court said:

"Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness."

In *McBoyle v. United States*, 283 U. S. 25, 27, the Supreme Court reversed a judgment of conviction and stated the principle applicable and the underlying reason:

"Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

It is urged that the statute must be construed so as to require for the proof of the felony defined in Section 145(b) more than mere proof of the misdemeanor defined in Section 145(a).

Furthermore, since the word "attempt" is not defined in this statute and would, therefore, ordinarily be held to have the meaning uniformly given at common law, any construction of that statute which would give it a different meaning, would render the statute so uncertain in its meaning and application as to be unconstitutional.

In view of the dominant nature of the question of statutory construction heretofore argued, it may be unnecessary to discuss at length the other questions presented. However, it is not intended to slight them. The question of petitioner's mental condition bore directly on the wilfulness of his alleged act, assuming that there was any

act. There was ample proof as to the mental condition of petitioner and the fact that this condition affected his wilfulness. An expert of unquestionable standing testified that his condition would affect his power to do things required of him under the income tax law. The court below was asked for specific instructions, which would give the jury the tests by which it could determine whether his mental condition precluded wilfulness on his part or had any effect on the alleged wilfulness (R. p. 394, fols. 1181-1182). An exception was taken to the court's failure to instruct the jury as requested. (R. p. 409, fol. 1226). The Court failed to give the requested instructions or to give any instruction at all upon the subject, by which the jury might be guided in testing the effects of petitioner's condition.

### CONCLUSION

It is urged that the petition presents an important question of Federal law of wide application and public interest, which has not been decided by this Court, a serious conflict between the opinions of the various judges who have passed upon this question and serious doubt in their minds as to the proper construction of the statute. It is urged further that the construction of the words of the statute in the courts below conflicts with applicable decisions of other courts and with the common law. For these reasons it is urged that the questions presented and the conflict of opinions with respect to them require the exercise of this Court's supervisory jurisdiction.

Respectfully submitted,

DAVID V. CAHILL,  
Attorney for Petitioner.

IN THE

**Supreme Court of the United States**

OCTOBER TERM 1912

**No. 278**

MURRAY R. SPIES,

*Petitioner,*

VS.

UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

**PETITIONER'S REPLY TO BRIEF OF THE  
UNITED STATES IN OPPOSITION**

DAVID V. CAHILL,  
*Counsel for Petitioner.*

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IN THE

**Supreme Court of the United States**

**OCTOBER TERM 1942**

**MURRAY R. SPIES,**

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against

**UNITED STATES OF AMERICA.**

No. 278.

**PETITIONER'S REPLY TO BRIEF OF THE  
UNITED STATES IN OPPOSITION**

*To the Honorable the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of  
the United States;*

The petitioner respectfully submits the following reply  
to the brief of the United States in opposition:

**1.**

The statement of the question presented as given in  
the Government's opposing brief is not accurate or  
complete.

Possibly the point as stated in the petition was not fully  
understood, although it has been clearly stated. The pri-  
mary question is one of statutory construction and has been  
treated as such by the judges who have passed upon this  
point in the Second and Seventh Circuits in the case at  
bar and two other cases:

*O'Brien v. United States*, 51 Fed. (2nd) 193, 198.

*United States v. Miro*, 60 Fed. (2nd) 58.



In his dissenting opinion in the *O'Brien* case Judge Alschuler made this unmistakably clear and Judge Learned Hand in the case at bar expressed the opinion that the logic of that dissenting opinion was unanswerable.

Counsel for the Government in their opposing brief stated the question as one presenting only the sufficiency of the indictment. That question was raised at the opening of the trial, but in the petition filed herein, in the Appellate Court below and in the trial court emphasis was laid upon the insufficiency of the evidence, and that question rested upon the question of statutory construction discussed in the *O'Brien* case, the *Miro* case and in the case at bar, and never settled by this Court. To state again this question, which goes beyond the sufficiency of the indictment and to the heart of the case, it is this, whether the two misdemeanors defined in Section 145(a) of the Revenue Act, of themselves and without the addition of any other element, constitute the felony defined by Congress in Section 145(b). Even if it were held that the indictment was sufficient, the question here presented would remain undecided, and the differences of opinion between the various judges who have passed upon the question of statutory construction in the Second and Seventh Circuits, would remain unsettled.

It is not helpful or pertinent, therefore, to discuss the cases cited by counsel for the Government in support of the indictment.

It is equally beside the point to cite the *O'Brien* and *Miro* cases as settling the question of statutory construction. Petitioner is asking that the very doubt created by those decisions be resolved by this Court.

With respect to the secondary question, presented briefly in our petition, the excerpts, quoted by opposing counsel from the trial court's instructions, demonstrate that there was no clear or specific statement of the tests by which the jury might determine whether any physical or mental condition of petitioner found by them would negative the alle-

gation and attempted proof of willfulness on the part of petitioner. The instructions dealt only with general principles and left untouched the only matter of practical importance, that is, the application of those principles to the concrete case.

It is respectfully urged that the question whether the indictment was sufficient is merely incidental and presents only one phase of the question of statutory construction presented to the court by the petitioner. Even though the indictment may possibly have been sufficient, the proof of the crime was not sufficient if the reasoning and conclusion of Judges Alschuler and Learned Hand are correct, that is, that the misdemeanors defined in subdivision (a) of Section 145 of themselves do not constitute the felony defined in Section 145(b).

Respectfully submitted,

DAVID V. CAHILL,  
Counsel for Petitioner.

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No 278

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CHARLES ELMORE BRIDLEY  
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**Supreme Court of the United States**

**OCTOBER TERM 1942**

**MURRAY R. SPIES,**

*Petitioner,*

**against**

**UNITED STATES OF AMERICA,**

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF ON BEHALF OF PETITIONER**

✓  
**DAVID V. CAHILL,**  
**Attorney for Petitioner.**

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# Supreme Court of the United States

OCTOBER TERM 1942

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MURRAY R. SPIES,

*Petitioner,*

against

UNITED STATES OF AMERICA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT

---

## BRIEF ON BEHALF OF PETITIONER

The opinion of the Circuit Court of Appeals is not yet reported. It appears at the end of the record; the number of the page is not yet available.

No opinion was rendered by the United States District Court for the Southern District of New York, in which the cause was tried.

### **Jurisdiction**

The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, Title 28, U. S. C. A., Sec. 347(a).



## Questions Presented

1. Whether the wilful omissions (a) to file a return of income and (b) to pay a tax thereon, defined as misdemeanors in Section 145(a) of the Internal Revenue Law, of themselves, without the addition of any other element, constitute the felony of attempting to defeat and evade the income tax law, defined in Section 145(b) of the same law.

2. Whether the word "attempts" in Section 145(b) is used in its common law significance, meaning positive and affirmative acts, or is intended by Congress in this statute to have a different and peculiar meaning, including not only positive acts, but also the mere omissions defined in Section 145(a).

3. Whether Section 145(b), if construed as intended to give the word "attempts" a meaning different from its meaning at common law, is not unconstitutional for uncertainty or lack of definition.

4. Whether the trial court did not err in failing to instruct the jury as to the effect of petitioner's mental and physical condition on his will power and the wilfulness of his alleged offenses.

## Statute Involved

Section 145 of the Revenue Act of May 10, 1934—Penalties.

(a) Any person required under this chapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who wilfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition

to other penalties provided by law, be guilty of a misdemeanor and, upon conviction by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than \$10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this title, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) The term "person" as used in this action includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs (May 10, 1934, 11:40 a. m., c. 277, Sec. 145, 48 Stat. 724).

### Statement

The indictment consisted of a single count, alleging that the defendant had wilfully attempted to defeat and evade the income tax law with respect to his income for the calendar year 1936. It was conceded at the outset of the trial in the District Court that he had a taxable income of approximately \$40,000 for the year 1936 and that there was due as tax upon that income approximately \$6,000 (R. 16) and that he had failed to make the required return or to pay the tax (R. 128). Counsel for the Government nevertheless proceeded with its proof and established those facts. It was claimed that the income of petitioner was larger than the amount conceded and that the tax was corre-

spondingly larger. It is contended and will be argued that essentially no more was proved than the failure to report his income and pay the tax due thereon. Petitioner contended in the trial court and in the appellate court below that the evidence showed only the failure to file the return and pay the tax, which are defined as misdemeanors in Section 145(a), but petitioner was not prosecuted for these misdemeanors. The question was raised whether under the circumstances even the delinquency was wilful. Wilfulness is specified in the statute as one of the essential items of the misdemeanors. However, the present cause is concerned only with the prosecution of the felony.

Petitioner was a young lawyer, whose income was derived in the main not from legal practice but largely from fees and commissions earned in the management of investment trusts. The year in question, 1936, was his one year of large income. It was derived from the sale of control of corporations, which sold securities of an investment trust. He had begun his career as an office boy in the office of a distinguished law firm in the City of New York (R. 134). Through the helpful associations formed there he entered the investment trust field and in 1933 he became associate counsel to an investment corporation. From that time until 1936 he acted as counsel and trustee for a number of investment trusts in association with men of distinction and good character (R. 135-136). He sold control of several distributing corporations on June 11, 1936, for the sum of \$40,000. There was a written agreement by which the transfer of control was effected and the transaction was completed in the usual manner (R. 16-17, 139). The sole circumstance, which the Government has emphasized, is that Spies received the \$40,000 in cash. The procedure by which the cash was obtained has been enveloped in unnecessary confusion by the emphasis laid upon certain details. It is undisputed that at the closing of the transaction Spies wrote his endorsement on a check for \$40,000, which was entered to him on behalf of the purchaser. This check has unaccountably disappeared.

Reighley, a Government accountant witness, testified that the entire endorsed check bearing the endorsement of Spies was an exhibit in a proceeding before the Securities and Exchange Commission, but that it never cleared. He did not know where this check was (R. 113). A photostatic copy of the face of the check was in evidence, but there was no copy of the back, containing the endorsement. The Government introduced in evidence another check for \$40,000, which did not bear the name of Spies, either as payee or endorser. Spies never saw that check. He asked that the check, which he did see, be cashed, because it was on a New Jersey bank, he was delivering the closing papers at the time, and this was the biggest transaction of his life (R. 142 et seq.). He paid \$2,000 to one Eddy by agreement and sent the balance to his home town, Lynbrook, Long Island, and deposited it in an old account of his wife in trust for his minor son, who had the same name as himself. The armored car in which the money was transported was hired by petitioner in his own name (R. 143). The money was later divided into several accounts in order to get the benefit of Government insurance of deposits (R. 143-144). All of the accounts were in the name of Spies, either in his own name or his wife's name in trust for one of their infant sons.

During the year 1936 Spies had very little other income, no more than a few thousand dollars, earned as salary from distributing companies (R. 144). Additional income was attributed to him by the prosecutor, but he testified that the transactions, involving the putative income, in the main represented transfer from one account to another, and in one instance a sum given him by his brother-in-law for investment (R. 145).

Shortly after he received the money petitioner invested \$25,000 with the Equitable Life Assurance Society in an annuity in his own name (R. 144). Improvident investments of his 1936 income by the summer of 1937 had involved him in serious loss and by the end of that year had practically wiped out his assets including his recently

acquired fortune (R. 157). In 1936 he had undertaken on his own resources to develop an investment fund program including two corporations. His commitments for this business were contracted in 1936 and for the most part during the year 1937. In order to keep up with the commitments on his new investment he first borrowed \$12,500 from the Manufacturers Trust Company with his annuity as security (R. 54-55). Subsequent loans in the year 1937 brought the total borrowed on his policy to the sum of \$22,691.50. The annuity policy was sold by the pledgee to pay the indebtedness and the balance remaining out of his annuity as a result of unfortunate investments amounted to \$718.98. He had previously bought a home out of the 1936 income for his wife and children in their own names. Foreclosure proceedings were begun on his home, but by borrowed money he managed to save it for the time being and then rented the house (R. 153-154). By the end of December, 1937, the greater part of the one big fee that he had received in his life, \$40,000, was completely gone (R. 157). The investment company proposition, which he attempted with his limited means to finance, failed. He then went to work as a stenographer (R. 157).

In the meantime Spies had consulted an accountant named Rosenberg in connection with his return and the payment of his tax for the year 1936. On behalf of petitioner and at his request Rosenberg filed with the Collector of Internal Revenue on March 11, 1937, an application for an extension to file his return. The extension to April 15, 1937, was granted (R. 45). Subsequently on behalf of Spies, Rosenberg again applied for an extension to May 15th and another extension until June 15th was granted (R. 45). The correspondence with respect to these extensions is in evidence as Government's Exhibits 8 to 15.

For several weeks prior to June 15, 1937, and on that day and subsequent thereto Spies was actually confined to bed under the care of two physicians. Apparently on his own initiative and as a matter of routine Rosenberg also filed on or before March 15, 1937, a tentative return for



Spies, which became Government's Exhibit 18 and contained the word "none" in the space allotted for income. The accountant testified that in his practice that explanation was used when it was not known definitely how much income there was or how much tax was due (R. 50). The accountant specifically remembered that Spies told him that he had an income for the year 1936 (R. 150).

There was proof that Spies for some years had suffered from a mental and physical condition, which may have contributed to his default in reporting his income and paying his tax. It is not meant to suggest that there was any total disability. Up to the year 1937 Spies had engaged in various activities relating to the corporations in which he was interested. Some of the activities were of the usual corporate character such as attendance at meetings of directors. Other persons were engaged to handle the affairs of the corporation, such as investment counsel, legal counsel and managers of various operations during this period. Beginning with the year 1931 Spies' applications for life insurance were rejected by seven or eight different companies and this fact resulted in the development of psychoneurosis during the years 1936 and 1937. He consulted from twelve to fifteen physicians. One of them, Dr. Gilman, treated him for a period of years beginning prior to this time and continuing through 1936 and 1937. He found Spies suffering from a physical condition of abnormally rapid heart action, or tachycardia. He also had high blood pressure (R. 191). In February or March, 1937, in one of the life insurance companies' reports, which was brought to Spies' attention, it was suggested that he had a coronary condition (R. 136). As a result of this he feared that he was going to 'drop dead at any time. When he was about to close the \$40,000 transaction in 1936 he called upon Dr. Sharpe to determine whether he was physically capable of going through with the transaction and went through with it only after receiving the doctor's assurance that he could do so (R. 140-141). Petitioner would not go into subways and feared an impulse



to jump out of windows (R. 137). He was reluctant to go into restaurants (R. 138). This condition was acute during the year 1937. There was nothing to indicate that he feigned illness or phobias, or that his condition was conveniently timed. The diagnosis of other doctors was confirmed by St. Stephen P. Jewett, an expert of high standing in the field of psychiatry and neurology (R. 227-233). Apparently the fears with respect to the possible results of his physical condition were unfounded.

There was no fraudulent act or no positive or affirmative act of concealment on the part of petitioner alleged or attempted to be proved. He had made no false report and no false statement.

It appears that the record of financial transactions as recorded on the stubs of check books made largely by petitioner's wife was not complete. This statement applies only to personal transactions. There was no suggestion that the records of the corporations in which petitioner was interested and through which most of his funds passed were not kept accurately and fully. It probably would not be helpful to discuss the calculation of additional income attributed to petitioner by Government investigators. Many of the items of alleged income were arbitrarily concluded to be income without adequate investigation and fair consideration of their nature. In one instance Spies definitely informed the Government accountant that a certain \$1,500 deposited was money obtained from his brother-in-law. Without examining the brother-in-law or investigating further the Government agents included the item as "unexplained income". There were many instances in which obvious duplications were included in the calculation of income (R. 103-110, 145, 148-150).

A more detailed explanation of the facts and circumstances would probably not be helpful to the court in deciding the limited questions presented for review.

## A R G U M E N T

### I

**The misdemeanors defined in Section 145(a) of the Revenue Act of May 10, 1934, do not constitute the felony defined in Section 145(b), and the evidence offered, tending to prove the commission of the misdemeanors, was not sufficient to establish the felony.**

The indictment contained but one count, alleging that petitioner had committed the felony; that is, that he had unlawfully attempted to defeat and evade the income tax imposed by the Revenue Act (R. 4-7). There was no allegation that he had committed the misdemeanors, wilful failure to report his income and wilful failure to pay the tax due on that income. In describing the felony it was alleged that the crime was committed by failing to report his income and failing to pay the tax, but it was not alleged that these omissions were wilful.

At the beginning of the trial the sufficiency of the indictment was challenged upon the theory that it alleged only the commission of the misdemeanors defined in Section 145(a) of the Revenue Act and these did not constitute the felony defined in Section 145(b) (R. 11-13). However, the trial court apparently assumed that, while the misdemeanors, or essential elements of them, were alleged as means of committing the felony, the allegation of the felony went beyond the description of the means and was intended to include any other essential element. The motion to dismiss the indictment was denied (R. 15).

The question of construction of the felony statute remained, and we are now arguing that question.

The Government proved that Spies failed to report his income and failed to pay the tax. There was no proof of wilfulness in these omissions, unless wilfulness is to be assumed from the mere delinquency. The evidence nega-

tived the imputation of wilfulness. Petitioner by applying for two extensions of time to file his return had notified the Collector of Internal Revenue that he was a potential taxpayer. He had suffered for some years from a physical condition, which precluded insurance, and from a resulting psychoneurosis, and he was ill when the second extension of time to file his return expired (R. 152). His funds were being rapidly exhausted by unfortunate investments. There was no issue with respect to these facts. The Government challenged only other cumulative proofs such as the proof that petitioner, in addition to obtaining extensions, had both telephoned and written to the Collector of Internal Revenue, and the proof that his mental condition might have interfered with his orderly and prompt attention to his duty in tax matters and other matters.

However, if it be assumed for the sake of argument that he wilfully failed to report his income and pay his tax, the fundamental question remains, whether these misdemeanors of themselves and without the addition of any other element constitute the felony.

If it be held as a matter of statutory construction that the misdemeanors constitute the felony, the result is that the same act proscribed as a misdemeanor in subdivision (a) of the statute is also a felony under subdivision (b).

The precise point was stated with perfect clarity by Judge Alschuler in his dissenting opinion in *O'Brien v. United States*, 51 Fed. (2nd) 193, 198:

"I cannot bring myself to believe that it was the intent of Congress by paragraph (a) to constitute the willful failure (1) to pay, (2) to make return, (3) to keep records, or (4) to supply information, misdemeanors subject to the prescribed penalties, and then by paragraph (b) to make the very same failures, without the remotest additional element, felonies subject to the penalties as therein specified" (p. 198).

Further Judge Alschuler said:

"Plainly this legislation contemplates that attempt includes something which mere failure or omission

does not. That something in my judgment is some affirmative act. Conduct which is wholly and only an omission as defined in (a) falls short of being an attempt as defined in (b). Thus while there is here present in the indictment and in the proof the willful omission of (a), there is entirely wanting the affirmative act to constitute the *attempt* which in my judgment is of the gist of (b). If paragraph (a) made the willful failure to make return a misdemeanor, it is hardly conceivable that Congress intended to make the very same willful failure to make the return a felony" (p. 198).

It was contended by counsel for petitioner in the court below that the logic of this argument is unanswerable and Judge Learned Hand, while finding himself constrained to concur in the affirmance of the judgment, was quoted in the opinion in the case at bar as wishing "it to appear that as a new matter he would decide otherwise, and would reverse this conviction in accordance with the reasoning of Judge Alschuler's dissent in *O'Brien v. United States*, supra, which appears to him unanswerable."

It may be added that the courts in several instances have declared that the misdemeanors defined in Section 145(a) are different from the felony defined in Section 145(b).

*United States v. Capone*, 93 Fed. (2nd) 840, 841;  
*O'Brien v. United States*, 51 Fed. (2nd) 193, 196.

In the *O'Brien* case, supra, the court affirmed a judgment of conviction for both misdemeanors of failing to make a return and the felony of wilfully attempting to defeat and evade the tax. The majority conceded this proposition:

"The offense of willful failure to file an income tax return is not the same as a willful attempt to evade and defeat an income tax."

If the statute were intended by Congress to embrace such cases as the one at bar clear warning of its intention must be given in the statute itself.

*Crooks v. Harrelson*, 282 U. S. 55, 61;

*Crawford on Statutory Construction*, Sec. 242, p. 472;

*McBoyle v. United States*, 283 U. S. 25, 27;

*United States v. Merriam*, 263 U. S. 179, 187-188;

*Partington v. Attorney General L. R.*, 4 H. L. 100, 122.

In *Crooks v. Harrelson*, 282 U. S. 55, 61, a civil tax case, this court said:

"Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness."

In *McBoyle v. United States*, 283 U. S. 25, 27, the Supreme Court reversed a judgment of conviction and stated the principle applicable and the underlying reason:

"Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair so far as possible the line should be clear."

It is urged that the statute must be construed so as to require for the proof of the felony defined in Section 145(b) more than mere proof of the misdemeanors defined in Section 145(a).

Apparently the sole obstacle to reversal of the conviction in the court below was the decision of the same Circuit Court of Appeals in *United States v. Miro*, 60 Fed. (2nd) 58. In that case the court conceded expressly that the mere omission to file a return and pay a tax would not amount to an attempt at common law. But it was argued that for some reason offenses under the Internal Revenue Law were to be treated differently from others. The sole suggested reason of the court for that assumption is that the



Revenue Act created an affirmative duty of reporting the income and paying the tax and that, therefore, this purely negative thing becomes positive and affirmative and the omission becomes something more than a mere omission.

The Revenue Act is not peculiar in creating an "affirmative" duty. The same may be said of any statute which requires anything to be done. In that respect, the Revenue Act is like uncounted other statutes. If the meaning of the word "attempt" is to be changed and its common law significance disregarded for any such reason, the change will be universal in its application and cannot be limited to its use in the Revenue Act.

It was also argued in the *Miro* opinion that the use of the words "in any manner" indicates an intention to cover all possible methods of evasion and not to require "specific means" as an "exclusive method of such evasion". It would seem that this subject does not bear any relation to the precise point now under consideration. In the misdemeanor statute Congress was definite and specific, because the omissions could be readily defined in Section 145(a). Congress could find no language that would be comprehensive of all the means and manners of evasion possible to a taxpayer and, therefore, was obliged to use general terms in 145(b). There is no reason for assuming that by these general terms Congress intended to include the specific omissions in Section 145(a), which it had already defined. It may be noted that of the judges who decided the *Miro* case only one participated in the decision of the case at bar.

The word "attempt" implies an act, something positive, not a mere omission.

*Burton v. State*, 62 So. 394, 395, 8 Ala. App. 295.

The word "attempt" means an act intended to effect the crime.

*Tharpe v. State*, 30 S. W. (2nd) 865, 182 Ark. 74, 79;

*People v. Anderson*, 37 P. (2nd) 67;

*Hammond v. State*, 171 S. E. 559, 47 Ga. App. 795;



*Alford v. Commonwealth*, 42 S. W. (2nd) 711, 240 Ky. 513;

*State v. Lourie*, 12 S. W. (2nd) 43;

*State v. Hudson*, 151 A. 562, 103 Vt. 17.

The word "attempt" implies both purpose and effort.

2 *Bishop New Cr. Prac.*, 4th Ed., Sec. 80.

Some act is necessary.

*State v. Thompson*, 118 Kan. 256, 234 P. 980.

*United States v. Quincy*, 31 U. S. 445, 465, 6 Pet. 445, defines the word as follows:

"To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress toward it. Any effort or endeavor to effect it will satisfy the terms of the law."

The essentials of the felony described in Section 145(b) have never been clearly defined. The language of the statute is not self-definitive. For definition of the word "attempt" resort must be had to the common law. There is no other source from which a definition could be drawn under our law and no other means by which the language used could be interpreted and defined.

It is urged that any construction of the statute, which would give the word "attempt" a different meaning from that uniformly given at common law, would render the statute so uncertain in its meaning and application as to be unconstitutional.

## 2

In view of the dominant nature of the question of statutory construction heretofore argued it may be unnecessary to discuss at length the other questions presented. However, it is not intended to slight them. The question of peti-

tioner's mental condition bore directly on the wilfulness of his alleged act, assuming that there was any act. There was ample proof as to the mental condition of petitioner and the fact that his condition affected his will power. Physicians who treated him and an expert of unquestionable standing testified that his condition would affect his will power to do things required of him under the income tax law (R. 226-241, 190-205, 358-365). The court below was asked for specific instructions, which would give the jury the tests by which it could determine whether his mental condition precluded wilfulness on his part or had any effect on the alleged wilfulness (R. 394). An exception was taken to the court's failure to instruct the jury as requested (R. 409). The court failed to give the requested instructions or to give any instruction at all upon the subject by which the jury might be guided in testing the effects of petitioner's condition.

### CONCLUSION

This cause involves a statute of wide application and increasing importance. Its construction by the court below and by one other circuit has been the subject of serious discussion and criticism. The reasoning of the judges opposed to the construction given the statute in the case at bar has not been successfully refuted. The sound construction based on that reasoning definitely distinguishes between the misdemeanors and the felony defined by Congress in different sections of the statute. In view of this distinction the judgment of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

DAVID V. CARILL,  
Attorney for Petitioner.

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**FILED**

**AUG 26 1942**

**CHARLES ELMORE CROPLEY**  
**CLERK**

**No. 278**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1942**

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**MURRAY R. SPIES, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINIONS BELOW**

The District Court rendered no opinion. The *per curiam* opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 429) is not reported.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered July 6, 1942 (R. 430). A petition for a writ of certiorari was filed August 3, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule



XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court on May 7, 1934.

#### QUESTIONS PRESENTED

1. Whether an indictment which charges that the petitioner wilfully attempted to evade and defeat his income tax by means of a wilful failure to file a tax return and a wilful failure to pay any income tax (which means are misdemeanors under Section 145 (a) of the Revenue Act of 1936) sufficiently alleges a felony under Section 145 (b) of the Act.

2. Whether the trial court sufficiently instructed the jury with respect to the element of wilfulness and evidence regarding the petitioner's physical condition at about the time of the offense.

#### STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

##### SEC. 145. PENALTIES.

(a) Any person required under this title to pay any tax; or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other



penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

\* \* \* \* \*

#### STATEMENT

Murray R. Spies, the petitioner, is an attorney-at-law (R. 134-135) who was indicted in the Southern District of New York on a charge of wilfully attempting to evade and defeat an income tax of \$8,841.63 due upon a net income of \$50,587.11, on or before March 15, 1937, for the calendar year 1936. The indictment charged that as a means of wilfully attempting to evade and defeat the said tax, on or about June 15, 1937 (the date of expiration of an extension of time for filing a return and paying the tax), the petitioner did wilfully and knowingly fail to make an income-tax return and wilfully failed to pay any

income tax (R. 4-7). After the jury was impaneled and sworn the petitioner moved to dismiss the indictment on the ground that it did not allege any affirmative act and hence did not charge any offense under Section 145 (b) of the Revenue Act of 1936, *supra*. This motion was denied (R. 9-15). At the end of the Government's case the petitioner's motion to dismiss the indictment was renewed (R. 128-129) and denied (R. 132).

The petitioner conceded that there was an income of \$40,000 for the year 1936 on which a tax of approximately \$6,000 was due, and a failure to file a return and to pay a tax (R. 15, 132). Four doctors of medicine testified on his behalf regarding his alleged physical condition at about the time of the offense (R. 190-205, 226-241, 348-365). Dr. Jewett, one of these witnesses, in response to a long hypothetical question, testified that in his opinion the petitioner was suffering from psychoneurosis (R. 226-236), and that this condition could interfere with his will to carry out his opinions, wishes, or desires in many ways (R. 233). With respect to this matter the trial court charged the jury as follows (R. 401):

You have heard a number of experts on the stand in this case. The credibility of witnesses who are experts and the weight of their testimony is likewise a question for the jury. The jury is not bound to accept the opinion of an expert simply because no other expert contradicted him. Indeed the only difference between expert witnesses

and other witnesses is that experts are permitted, under the law, to testify as to their opinions. The jury must decide whether and to what extent to accept the opinions of the experts.

One of the witnesses called on behalf of the defendant—Dr. Jewett—had not examined the defendant. You will recall that his testimony was based upon a hypothetical question. It is within the province of the jury to decide which of the facts hypothetically stated to that witness actually exist. If the jury finds that none of the facts hypothetically stated is true, then, of course, the opinion is entirely without weight. It is not, however, to be understood that the entire opinion fails unless all of the assumed facts are found by the jury to be true. The jury may accord weight to the expert's answer as it find[s] the assumed facts to have been proven.

The court further instructed the jury with respect to a wilful attempt to evade a tax as follows (R. 402-403):

Before you find the defendant guilty you must find that intentionally and wilfully he attempted to evade or defeat the tax.

The law uses the word "attempt". Attempt means to try to do or accomplish. In order to find an attempt it is not necessary to find affirmative steps to accomplish the prohibited purpose. An attempt may be found on the basis of inactivity or on refraining to act, as well.

The statute also uses the word "evade". That word has been defined to mean to avoid by artifice, to avoid by device or stratagem, by concealment, by intentionally withholding a fact which ought to be communicated.

Such evasion must be differentiated from the use of legitimate means to minimize the tax. The latter is not a crime; but a wilful attempt to evade a tax is a crime.

The statute uses the word "wilfully". I will try to define that word. Wilfully often denotes an act which is intentional, or knowing or voluntary as distinguished from accidental. But when used in a criminal statute, it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether or not one has the right to so act.

Again with respect to wilfulness I will charge you, as I did with respect to attempt, that wilfulness is not limited to acts of commission—affirmative acts. It may describe omissions, or failure to take required action.

The petitioner was found guilty as charged (R. 412). A motion in arrest of judgment on the ground that the indictment failed to state facts constituting any crime was denied (R. 414), and a sentence of a year and a day was imposed (R.

415). Upon appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 418-427), the judgment of conviction was affirmed (R. 429).

## ARGUMENT

### I

The indictment in this case charged that petitioner had wilfully attempted to evade and defeat the tax and stated the means relied on to constitute that charge. It was in the usual standard form which has been held sufficient in many cases. *O'Brien v. United States*, 51 F. (2d) 193 (C. C. A. 7th), certiorari denied, 284 U. S. 673; *United States v. Miro*, 60 F. (2d) 56 (C. C. A. 2d); *Oliver v. United States*, 54 F. (2d) 48 (C. C. A. 7th), certiorari denied, 285 U. S. 543; *Bowles v. United States*, 73 F. (2d) 772 (C. C. A. 4th), certiorari denied, 294 U. S. 710; *Kitrell v. United States*, 76 F. (2d) 333 (C. C. A. 10th), certiorari denied, 296 U. S. 643; *Capone v. United States*, 56 F. (2d) 927 (C. C. A. 7th), certiorari denied, 286 U. S. 553. There is no decision to the contrary. Evidence was introduced which sustained the allegations in the indictment and the jury found petitioner guilty.

Petitioner does not make any contention regarding this aspect of the case not previously considered and found wanting in two or more of the cases previously cited: His contention that he was improperly convicted of a felony because all that was charged and proved against him were



omissions specifically made misdemeanors by another subsection of the section under which he was convicted, has been considered and answered in *United States v. Miro, supra*; *O'Brien v. United States, supra*; *Oliver v. United States, supra*; *Bowles v. United States, supra*; and *Kitrell v. United States, supra*. No decision supports his contention. His further contention that no offense under the statute herein involved can be committed without affirmative action and that failure to do any of the acts required by the tax laws cannot be regarded as an "attempt" to defeat or evade them, has been considered and rejected in *United States v. Miro, supra*, and *O'Brien v. United States, supra*. No decision supports his contention.

## II

With respect to petitioner's further contention that the trial court erred in failing to give certain requested instructions in connection with the element of wilfulness (Pet. 2, 10, 15-16), as shown by the Statement, *supra*, pp. 5-6, the trial court fully, fairly, and correctly instructed the jury in this respect. See *United States v. Murdock*, 290 U. S. 389. Apparently referring to requested instructions Nos. 21, 22, 23, and 24 (R. 394), the petitioner is in error in suggesting (Pet. 2) and stating (Pet. 16) that the trial court failed to give these instructions or "any instruction at all upon the subject." See Statement,



*supra*, pp. 4-5. The instructions requested by petitioner were equivalent to a direction that if the jury found that the petitioner's physical condition was as alleged, the jury must find that petitioner's omissions were not wilful and that petitioner was not guilty. The question of wilfulness is a jury question (*United States v. Murdock, supra*, p. 396) and petitioner was not entitled to have the court instruct the jury as to what weight the jury must give to particular items of evidence. The court properly refused to single out and over-emphasize such expert medical testimony. *Perovich v. United States*, 205 U. S. 86, 92.

#### CONCLUSION

The decision below is correct. Neither an important question of law nor a conflict of decisions is presented. It is, therefore, respectfully submitted that the petition should be denied.

CHARLES FAHY,

*Solicitor General.*

SAMUEL O. CLARK, Jr.,

*Assistant Attorney General.*

SEWALL KEY,

ELLIS N. SLACK,

EARL C. CROUTER,

*Special Assistants to the Attorney General.*

VALENTINE BROOKES,

*Attorney*

AUGUST 1942.

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CLERK

**No. 278**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1942**

**MURRAY R. SPIES, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF FOR THE UNITED STATES**

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# **In the Supreme Court of the United States**

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**UNITED STATES OF AMERICA**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

---

**BRIEF FOR THE UNITED STATES**

---

## **OPINIONS BELOW**

The District Court rendered no opinion. The *per curiam* opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 429) is not yet reported.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered July 6, 1942. (R. 430.) A petition for a writ of certiorari was filed August 3, 1942, and granted October 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of



the Judicial Code, as amended. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court on May 7, 1934.

#### QUESTIONS PRESENTED

1. Whether the failure to file an income tax return and pay the tax due with the willful intent to evade and defeat the tax constitutes an offense under Section 145 (b) of the Revenue Act of 1936.

2. Whether the trial court sufficiently and correctly instructed the jury with respect to the element of willfulness as it relates to the evidence regarding the petitioner's physical condition at about the time of the offense.

#### STATUTES INVOLVED

The statutes involved are set forth in the Appendix A, *infra*, pp. 43-45.

#### STATEMENT

Murray R. Spies, the petitioner, was indicted in the Southern District of New York on a charge of willfully attempting to evade and defeat an income tax of \$8,841.63 due upon a net income of \$50,587.11, on or before June 15, 1937, for the calendar year 1936.

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<sup>1</sup> This question is raised by the petitioner in connection with the propriety of the charge of the trial court, the sufficiency of the evidence and the sufficiency of the indictment.

The indictment alleged that during 1936 and to June 15, 1937, the petitioner's legal residence was within the First Internal Revenue Collection District of New York; that he maintained his office and principal place of business in the Second Internal Revenue Collection District, in the Southern District of New York; that during such year the petitioner received a net income of \$50,587.11, on which he owed to the United States an income tax of \$8,841.63; that the petitioner was required, on or before March 15, 1937, to make an income tax return, under oath, and to pay at least one-fourth of such tax to one of the Collectors of Internal Revenue for one of the said districts; and that the petitioner, upon application, was allowed until June 15, 1937, within which to file such return and to make such payment or payments. (R. 5-6.) The "charging part" of the indictment then alleged (R. 6-7):

That the said MURRAY R. SPIES, the defendant herein, well knowing all the premises aforesaid and being indebted to the United States in the amount aforesaid by reason of the said tax imposed by the said Act of Congress, did on or about the said 15th day of June, 1937, at the Southern District of New York and within the jurisdiction of this Court, wilfully, knowingly, unlawfully and feloniously attempt to evade and defeat the said tax in the said sum of approximately \$8,841.63 upon his said net income for the said calendar year ending

December 31, 1936, and *as a means* of so wilfully attempting to evade and defeat the said tax did then and there wilfully and knowingly fail to make an income tax return for the said calendar year as required by the said Revenue Act, or any income tax return for the said period, on or before the said 15th day of June, 1937, or at any other time to the said Collector of Internal Revenue for the said Second Internal Revenue Collection District who maintained his office in the City, State and Southern District of New York and within the jurisdiction of this Court, or to the Collector of Internal Revenue for the First Collection District aforesaid, or to any other collector or proper officer of the United States, and he did then and there and at all times herein mentioned wilfully fail to pay to either of the said Collectors of Internal Revenue or to any other proper officer of the United States any sum of money on account of the said tax debt for the said calendar year;  
 \* \* \* [Italics supplied.]

After the jury was impaneled and sworn the petitioner moved to dismiss the indictment on the ground that it did not allege any affirmative act and hence did not charge any offense under Section 145 (b) of the Revenue Act of 1936, which motion was denied. (R. 9-15.) At the end of the Government's case the petitioner's motion to dismiss the indictment was renewed (R. 128-129) and denied (R. 132).

The petitioner is an attorney-at-law, a member of the New York bar. (R. 134-135.) In 1936 he was associated with certain companies in the investment trust field, acted as a voting trustee under a trust indenture and was employed by certain of the companies under employment and commission contracts. (R. 67-69, 135, 139-140.) On June 11, 1936, the petitioner entered into a contract whereby he resigned as trustee and surrendered all interests in the companies under the contracts or otherwise in return for the payment of \$40,000. (R. 16-17, 67-70, 139-140.)

The attorney for the purchasing interests testified that after the signing of the agreement the method of payment was discussed. The petitioner at that time stated that he did not want a check, he wanted cash. (R. 18.) Accordingly, representatives of the purchasers and the petitioner proceeded from the petitioner's office in New York to a New York bank. There a bank treasurer's check payable to Donald P. Kenyon, the principal purchaser, and endorsed by him was cashed and the cash given to the petitioner. (R. 18-19, 20-21.) At the request of the petitioner arrangements were then made in the bank for the transportation of the cash by armored truck. (R. 21-22.) Of the cash \$38,000 was carried by armored truck to the Lynbrook Bank & Trust Company, Lynbrook, Long Island. (R. 25-28, 71, 143.) This amount was there deposited in an existing account in the name

of Marie V. Spies, the petitioner's wife, in trust, for Murray Robert Spies, Jr., a son. (R. 88, 143.) The balance of \$2,000 was loaned to an associate of the petitioner. (R. 71, 142, 258.) At the time of this transaction the petitioner had an existing account in his own name in another New York bank. (R. 71, 74.)

On June 16, 1936, \$33,000 of the \$38,000 payment was withdrawn from the account in which it was originally deposited and was divided and deposited in seven accounts standing in the name of the petitioner's wife or in her name in trust for the petitioner's sons. Two of these accounts were opened with these deposits. (R. 88-89, 91, 143-144.) On July 25, 1936, \$25,000 of this money was withdrawn from various of these accounts, including the two new accounts, and was invested in an insurance company annuity policy in the petitioner's name. (R. 88-91, 144.)

Late in February or early in March of 1937, the petitioner engaged an accountant to prepare his income tax return for 1936. At that time the petitioner gave the accountant no definite information as to his income but was to furnish the information later. On March 11, 1937, the petitioner requested the accountant to secure an extension of time within which to file the return, the accountant made the application and an extension to April 15, 1937, was granted. (R. 44-45.) On March 15, 1937, as a matter of office routine, the

accountant mailed to the Collector a tentative return for 1936 in the petitioner's behalf. The accountant did not recall how the tentative return was signed. (R. 48-49.) Subsequent to April 14, 1937, the accountant again applied for an extension of the time for filing a return and a second extension to June 15, 1937, was granted: (R. 45.) The accountant discussed the matter of the preparation of the return with the petitioner four times, at the time of the original employment, at the time of each application for an extension, and at the time of the expiration of the final extension. In these conversations the petitioner disclosed that he had income in 1936, a discussion was had as to deductions and at one time the petitioner might have asked for a rough calculation of an amount of tax. At no time, however, did the petitioner give the accountant definite information as to his income and deductions or supply any records or figures. (R. 45, 47, 49-53.) After the expiration of the second extension the accountant withdrew from the matter. (R. 47.)

At no time did the petitioner file any final income tax return for 1936 or pay any tax for that year. The office of the Collector of Internal Revenue contained no record of the filing of any tentative return for that year. On April 15, 1936, the petitioner had filed a final income tax return for the year 1935. (R. 39-42, 44, 381.)



In February of 1937 the petitioner became interested in a new investment trust venture. An initial investment in the project of \$1,500 was made by the petitioner. In April of 1937 he and his wife entered into an agreement for the investment by them of \$11,000. Additional investments were subsequently made by the petitioner in the venture, all of the investments totalling between \$15,000 and \$20,000. All of the investments, except a small advance made in December, 1936, were made in 1937. (R. 151, 182-186.) Beginning on July 1, 1937, the petitioner obtained bank loans by pledging as collateral the annuity policy purchased in July of 1936. At the end of December, 1937, the bank loans totalled \$22,700. (R. 54-57.) This money was borrowed to meet the investment obligation. (R. 152.) The investment trust project failed late in 1937 or early in 1938. (R. 157, cf. R. 339-340.) On August 5, 1938, the petitioner's bank loans were unpaid and the annuity policy posted as collateral was sold by the bank. (R. 56-57.) As late as August 30, 1937, however, the petitioner stated in writing in connection with an application for a mortgage loan on the purchase of a house that his net worth was \$40,000. (R. 256-258.)

In April of 1939 an examination of the petitioner's income taxes for 1936 was begun by internal revenue agents. Thereafter the petitioner on request of the agents turned over to them cer-

tain records relating to bank accounts in his own name or in the names of members of his family. The petitioner stated that all of these accounts were under his control. (R. 58-65, 76.) On the basis of these records and records secured from the banks the investigating Revenue Agent made an analysis of the bank deposits of the petitioner in 1936. (R. 71-75.) This analysis showed total deposits by the petitioner of approximately \$99,000. Approximately \$48,000 of these were identified as transfers between the accounts. Various other items were found subject to explanation and eliminated. A balance of approximately \$10,000 of the deposits remained entirely unexplained. (R. 80-85.) The list of unexplained deposits was shown to the petitioner and on three occasions the opportunity was offered to him to explain their source. He was unable at any time to explain the deposits. (R. 119, 120-121.) On the basis of his investigation the Revenue Agent concluded that the petitioner had net income in 1936, inclusive of the unexplained bank deposits, of \$50,587.11 on which a tax of approximately \$8,000 was due. (R. 86-87.)

The petitioner conceded at the outset of the trial that he had an income of \$40,000 in 1936, on which a tax of approximately \$6,000 was due. (R. 15.) In testifying in his own behalf he sought to explain his request for the payment of the \$40,000 in cash and its deposit in his wife's account but his

explanation as to the deposit varied from a prior explanation given to the Government agents. (R. 143, 160-163.) He further stated that at the time of the transaction a check for \$40,000 payable to his order had been delivered to him and had been endorsed by him and returned to the purchasers, (R. 141-143.) No record existed, however, of this check ever having become operative and in fact one witness testified that the check never cleared. (R. 19-20, 22-23, 113-116, 159, 287-289.) As to the splitting up of the bulk of the payment among a number of bank accounts the petitioner explained that it was done to come within the maximum limit of federal deposit insurance. (R. 143-144.) The petitioner likewise offered a specific explanation for certain of the unidentified bank deposits and a general explanation for all of them but he finally admitted that it would be impossible for him to explain many of the items in detail. (R. 145-150, 161, 163-178.)

With respect to his failure to file an income tax return the petitioner testified that on May 15, 1937, he wrote to the Collector of Internal Revenue stating that he had not been able to contact his accountant and did not know whether his return had been filed or not. (R. 156.) The accountant's testimony is in sharp contrast to the contents of this letter, *supra*, p. 7. The petitioner further testified that in September or October of 1937 he telephoned the office of the Col-

lector, spoke to a young lady there, and asked her to note on his file that he expected a sum of money which would enable him to file his return and pay his tax within a month or so. (R. 156, 253-254.) The Collector's office contained no record of this call. (R. 39-41, 379-381.) Finally, the petitioner testified that in 1937 he sent to the Collector's office for 1936 income tax return blanks and that in March or April of 1938 he wrote to two or three brokerage houses for data in connection with his 1936 income tax return. (R. 156-157, 322-323, 335; see also R. 334.)

The principal defense, however, was based upon evidence as to the petitioner's physical condition. The petitioner himself testified that throughout 1936 and 1937 he was in serious ill health resulting from a constant fear of instant death caused in turn by the rejection of his applications for insurance policies on the ground of a heart condition. (R. 136-139.) Three physicians who had examined the petitioner testified on his behalf that during those years he was organically sound but was suffering from a fear psychosis or neurosis which would produce a neglect of ordinary business affairs and cause a tendency to procrastinate. (R. 190-202.) An expert psychiatrist, in response to a long hypothetical question, stated as his opinion that the subject of the question was suffering from a mental disorder known as psycho-neurosis which might cause procrasti-

nation and could interfere with the subject's will to carry out his opinions, wishes or desires. (R. 226-234.) All of the doctors testified, however, that the effects of the condition were entirely variable, causing interference with the ability to handle ordinary affairs at one time and not at a later time. (R. 195-201, 234-241, 353-357, 363; cf. R. 384-390.)

To meet this defense the Government cross examined the petitioner at length and in detail as to his activities in 1936 and 1937. In response to these questions he admitted that during this period he undertook and carried out a re-investment of his newly secured fortune, participated in the organization of corporations, participated in numerous directors' meetings, participated in the management of corporations engaged in the investment trust field, assisted in the registration of securities with the Securities and Exchange Commission, assisted in the preparation of contracts and the negotiation of loans, carried on extensive business correspondence, rendered legal advice to corporations, negotiated personal loans, made application for personal insurance policies and negotiated for and purchased a house. (R. 181-189, 206-226, 249, 252-281, 290-320; see also R. 365-376.)

With respect to the testimony as to the petitioner's physical condition the trial court charged the jury in part as follows (R. 405-406):



Evidence has been presented that defendant's failure to file a return and pay the tax for 1936 was not part of a wilful attempt to evade or defeat the tax but was brought about by his physical and mental condition in 1937. Again I charge you that wilfulness is an element of the crime charged and that the Government has the burden of proving wilfulness beyond a reasonable doubt. It is for you to determine from all the facts and circumstances and the legitimate inferences which may be drawn therefrom whether the defendant's mental condition in 1937 was such that wilfulness to commit the crime charged cannot be ascribed to him. Unless you find beyond a reasonable doubt that the defendant's conduct was wilful, you must acquit the defendant.

The court further instructed the jury with respect to a willful attempt to evade a tax as follows (R. 402-403):

Before you find the defendant guilty you must find that intentionally and wilfully he attempted to evade or defeat the tax.

The law uses the word "attempt". Attempt means to try to do or accomplish. In order to find an attempt it is not necessary to find affirmative steps to accomplish the prohibited purpose. An attempt may be found on the basis of inactivity or on refraining to act, as well.

The statute also uses the word "evade". That word has been defined to mean to



avoid by artifice, to avoid by device or stratagem, by concealment, by intentionally withholding a fact which ought to be communicated.

Such evasion must be differentiated from the use of legitimate means to minimize the tax. The latter is not a crime; but a wilful attempt to evade a tax is a crime.

The statute uses the word "wilfully". I will try to define that word. Wilfully often denotes an act which is intentional, or knowing or voluntary as distinguished from accidental. But when used in a criminal statute, it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether or not one has the right to so act.

Again with respect to wilfulness I will charge you, as I did with respect to attempt, that wilfulness is not limited to acts of commission—affirmative acts. It may describe omissions, or failure to take required action.

The court refused a request to instruct that an affirmative act was necessary to constitute a wilful attempt. (R. 409.)

The petitioner was found guilty as charged. (R. 412.) A motion in arrest of judgment on the ground that the indictment failed to state facts constituting any crime was denied (R. 414),

and a sentence of a year and a day was imposed (R. 415). Upon appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 418-427), the judgment of conviction was affirmed (R. 429).

#### • SUMMARY OF ARGUMENT

I. The petitioner was charged with willfully attempting to evade and defeat his income taxes for 1936 in violation of Section 145 (b) of the Revenue Act of 1936 and as a means thereof it was alleged that he willfully failed to file a return and pay a tax. The trial court instructed the jury that the statute did not require affirmative steps. In seeking a reversal of conviction the petitioner contends generally that Section 145 (b) does not include an attempted evasion by means of a willful failure to file a return and pay a tax but requires affirmative action.

a. Section 145 (b) of the Revenue Act of 1936 declares to be a felon he "who willfully attempts in any manner to evade or defeat any tax." The petitioner here received substantial income on which a tax was due. He was under a statutory duty to file a return and pay the tax but he failed to perform this duty. The jury concluded that his conduct was with the willful intent to evade the tax. His conduct was thus within the ordinary meaning of the language of the section and its inclusion is required by the sweeping phrase "in any manner."

The section clearly includes an attempt to evade by means of the filing of a false return. An attempt to evade by means of a failure to file a return is equally culpable and offers a greater obstruction to the administration of the tax laws. The petitioner's argument, however, would require the application of a lesser punishment and a shorter statute of limitations to the latter conduct. The practical application of the statute thus reinforces an interpretation of the section in accordance with its ordinary meaning. All decisions on the point have interpreted the section in accordance with the charge of the trial court here.

The inclusion in Section 145 (b) of an attempt to evade by means of a failure to file a return does not render the section inconsistent with Section 145 (a) which defines as misdemeanors the willful failure to file a return or to pay a tax. The offenses under the two sections differ in their essence, in their constituent elements and in their purposes. Furthermore, the word "attempts" in Section 145 (b) is not used in the same restricted sense as in common law "attempts" with the requirement of affirmative acts. The reasons for the common law rule are inapplicable in the presence of the affirmative statutory duty to file a return and pay a tax. Moreover, the existence of the affirmative duty renders the conduct of the petitioner a criminal attempt under the general principles controlling the common law offense.

b. The evidence here was sufficient to support the conviction whatever the interpretation of Section 145 (b). The record reveals the commission of affirmative acts of concealment of income by the petitioner and the jury concluded that his conduct was with the willful intent to evade. The concealment performed substantially endangered the public revenue.

c. The indictment alleged an offense under Section 145 (b) in the statutory terms and is likewise sufficient whatever the interpretation of the section. The allegations as to the means of attempted evasion were unnecessary. They were not prejudicial and hence may be disregarded as surplusage.

2. The judgment of the court below also is correct in affirming the District Court's instructions to the jury with respect to the element of willfulness, particularly as it related to the evidence regarding the petitioner's physical condition at about the time of the offense. The trial court fully and correctly instructed the jury with respect to the question of willfulness, and there is no error in this respect.

#### ARGUMENT

#### I

THE PETITIONER WAS PROPERLY CONVICTED FOR A VIOLATION OF SECTION 145 (b) OF THE REVENUE ACT OF 1936

The petitioner was charged in a single count with willfully attempting to defeat and evade his

income tax for the year 1936 in violation of Section 145 (b) of the Revenue Act of 1936 (Appendix A, *infra*, p. 45). (R. 4-7.) The indictment alleged that as a means of so doing he willfully failed to file an income tax return and pay a tax for that year within the time required by law. (R. 7.) The evidence established, and it was conceded, that the petitioner received income in 1936 in a substantial amount and that a considerable tax was due thereon. (R. 15, 16-18, 21-22, 69, 71, 75-76, 80-88, 120-121.) It was likewise unquestioned that no return for 1936 had ever been filed by the petitioner and no tax paid. (R. 39-40, 44.) The detailed evidence as to the circumstances surrounding the petitioner's receipt and handling of income in that year and his failure to file a return was such that the jury might properly have found that his conduct in failing to file the return and pay the tax was carried out with the willful intent to evade the tax due. (R. 18-19, 21-22, 44-49, 53, 58-63, 69-71, 75-91.) The various elements of the crime charged, and particularly the requirements of willful intent within the meaning of Section 145 (b), were carefully stated to the jury in the charge of the trial court. (R. 401-407.) The trial court expressly charged that the petitioner could be found guilty only of a willful attempt to evade the income tax and could not be found guilty of the offenses of a willful fail-

ure to file a return or to pay a tax. (R. 403, 407.) Included in the charge were instructions that the statutory word "attempt" did not require affirmative steps and that the willfulness required might relate to a failure to take required action. (R. 402, 403.) These instructions were in accord with the prevailing interpretation of the statute in force in that circuit. *United States v. Miro*, 60 F. 2d 58 (C. C. A. 2d). The jury concluded that the petitioner was guilty. (R. 412.) The Circuit Court of Appeals unanimously affirmed the judgment of conviction, but Judge L. Hand indicated that as a new matter, uncontrolled by prior decisions, he would have decided otherwise. (R. 429.)

The petitioner here contends generally that Section 145 (b) of the Revenue Act does not include an offense which rests only on a failure to file a return and pay a tax and that some affirmative act is required before the statute is violated.<sup>2</sup> The petitioner defines this principal issue before this Court in terms of whether allega-

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<sup>2</sup> This problem of statutory construction conceivably could be raised as a question of the sufficiency of the indictment, of the sufficiency of the evidence, or of the propriety of the court's charge. The petitioner frames his argument generally on all grounds. We believe, however, with the court below, that the statutory question is raised squarely only as a question of the correctness of the trial court's charge and accordingly we shall base our following argument on this premise. Thereafter we will indicate the other factors bearing on the sufficiency of the proof and the indictment.



tions and proof of the misdemeanors proscribed by Section 145 (a) can constitute the felony under Section 145 (b). Specifically he claims that the mere failure to file a return or pay a tax albeit willful, cannot alone sustain a conviction under the felony statute. In so stating his position, however, the petitioner has assumed the absence of those additional factors which we believe to be present and to complete the crime of willfully attempting to evade and defeat the tax. We shall hereinafter discuss these additional factors in detail.

(a) Insofar as material Section 145 (b) declares that "any person" shall be guilty of a felony "who willfully attempts in any manner to evade or defeat any tax imposed by this title". The petitioner here was under an affirmative duty by statute to file a return and pay a tax within a specified time. (R. 15; Revenue Act of 1936, Sec. 51, Appendix, *infra*, p. 44.) He did not file the return or pay the tax at the specified time or at any time. He in fact received substantial income and a considerable tax was due. The jury concluded from the circumstances surrounding the petitioner's conduct that he acted with the intent to willfully evade the tax due. If Section 145 (b) is read in the light of the ordinary meaning of its language, then the petitioner's conduct fell plainly within the statute, for it consisted precisely of a willful attempt to evade the tax.

The statute speaks of an attempt to evade "in any manner." Certainly, a failure to file a return at all with the intent to evade is one of the most obvious means of attempted evasion. It, therefore, is necessarily within the statutory definition.

A consideration of the petitioner's argument as it would affect the practical application of the section reinforces the conclusion indicated by the language of the statute. The filing of a false return which omits a known item of income with the intent of thereby evading a tax is probably the most familiar example of violation of Section 145 (b). He who deliberately avoids filing any return with the same purpose is equally culpable for the same reason. *Cf. United States v. Troy*, 293 U. S. 58, 61-62. The petitioner's argument, however, would free the latter from guilt of this crime and would subject him only to the lesser punishments of a misdemeanor under Section 145 (a) of the Revenue Acts. Yet, the evader who files a return, even though it be incomplete, assists partially in the administration of the tax laws by indicating at the very least his existence as a taxpayer and by thereby affording an opportunity for the setting in motion of the governmental audit machinery. The taxpayer who files no return baries his guilt more deeply. His existence as a taxpayer must first be discovered be-

fore his guilt can be shown.<sup>3</sup> Particularly is this true if he be consistent in his failure to file and if his income be from illegal sources themselves concealed. So again, the petitioner's argument would reward the greater obstruction of the administration of the tax laws with lighter punishment. The reward is made even more peculiar since the lesser crime to which the petitioner would limit the failure to file carries a three-year statute of limitations, the greater crime a six-year period. (Internal Revenue Code, Section 3748.) The greater concealment should not be given the better opportunity to succeed. It is in the light of these considerations that the statute should be construed and applied.

Included in the category of those who often both consistently fail to file returns and conceal the sources of their income are the particularly flagrant violators of the income tax laws, the political grafters, gamblers, racketeers and gangsters. Cf. *O'Brien v. United States*, 51 F. 2d 193 (C. C. A. 7th), certiorari denied, 284 U. S. 673, *United States v. Miro, supra*; *United States v. Capone*, 93

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<sup>3</sup> In this case the petitioner did reveal his existence as a taxpayer through his making application for extensions of time within which to file his return. (R. 40-49.) The problem of statutory construction here raised, however, is general in scope and the existence in the present record of these factors does not detract from the force of the above argument. These acts of the petitioner bear solely on the issue as to his intent and were considered by the jury in that respect under an express charge of the trial court. (R. 405, 407.)

F. 2d 840 (C. C. A. 7th), certiorari denied, 303 U. S. 651. If these evaders are to be subject only to the punishments of a misdemeanor and are to have the benefits of a short statute of limitations, the Government's law enforcement powers will be considerably curtailed at the very point that they are most needed. There is left as the normal subject of the more efficient weapon provided in Section 145 (b) the person who will pay a tax but who seeks to tailor the size of the tax to fit his personal desires. Indeed, the potential evader is thus invited not to file any return, since it would require little intelligence to choose the method carrying the lesser punishment and possibly the greater opportunity of success.

The legislative history of Section 145 (b) contains no discussion expressly dealing with the problem here raised. Section 145 (b) in its present form, however, first appeared as Section 1017 (b) of the Revenue Act of 1924 (Appendix A, *infra*, p. 43). Its appearance was an incident of a breakdown of a single section which had provided the same punishment for all income tax offenses. The new provisions, of which Section 1017 (b) was one, provided a careful gradation of the offenses and the punishments according to the seriousness of the crime. See H. Conference Rep. No. 844, 68th Cong., 1st Sess., p. 32 (1939-1 Cum. Bull. (Part 2) 300) (Appendix B, *infra*, p. 46). In making these gradations of crime Congress must have had in mind practical considera-

tions such as those mentioned and have intended similar punishments for conduct of equal culpability.\*

The present question was first squarely raised in 1931 in *O'Brien v. United States*, 51 F. 2d 193 (C.

\* In addition the breadth of the present Section 145 (b) is emphasized by the continued gradual enlargement of the provision by Congress. The original form appearing in Section 38 Eighth of the Corporation Excise Tax of 1909 and Section II F of the Income Tax Law of 1913 was "who makes any false or fraudulent return or statement with intent to defeat or evade the assessment." The provision continued in this form until the Revenue Act of 1918. See Revenue Act of 1916, Sec. 18; Revenue Act of October 3, 1917, Sec. 1209. In Section 1308 (b) of the 1918 Act the provision was amended to read "who willfully attempts in any manner to evade such tax." Compare H. R. 12863, 65th Cong., 2d Sess., Sec. 1308, as reported to the House (Union Calendar No. 253); H. R. 12863, 65th Cong., 3d Sess., Sec. 1308 (b), as reported to the Senate (Calendar No. 563), and as found in the Conference Committee Print; see H. Rep. No. 767, 65th Cong., 2d Sess., p. 39 (1939-1 Cum. Bull. (Part 2) 116); S. Rep. No. 617, 65th Cong., 3d Sess., p. 18 (1939-1 Cum. Bull. (Part 2) 130); H. Conference Rep. No. 1037, 65th Cong., 3d Sess., p. 90 (1939-1 Cum. Bull. (Part 2) 164) (Amendment No. 554). The 1918 form was re-enacted in Section 1302 (b) of the Revenue Act of 1921. As we have stated the provision was first enacted in its existing form in Section 1017 (b) of the Revenue Act of 1924 with the expansion to read "who willfully attempts in any manner to evade or defeat any tax imposed by this Act or the payment thereof" (italics supplied to indicate new matter). Compare H. R. 6715, 68th Cong., 1st Sess., Sec. 1017 (a) as reported to the House, Sec. 1017 (c) as reported to the Senate, and Sec. 1017 (b) as found in the Conference Committee Print; see H. Rep. No. 179, 68th Cong., 1st Sess., pp. 71-72 (1939-1 Cum. Bull. (Part 2) 235); S. Rep. No. 398, 68th Cong., 1st Sess., p. 45 (1939-1 Cum. Bull. (Part 2) 297); H. Conference Rep. No. 844, *supra*.

C. A. 7th), certiorari denied, 284 U. S. 673, *supra*. The Circuit Court of Appeals for the Seventh Circuit after full consideration of the problem upheld a conviction under Section 145 (b) in similar circumstances. Without exception in every case in which the issue has since been raised or been implicit the decision has been the same. *Oliver v. United States*, 54 F. 2d 48 (C. C. A. 7th); certiorari denied, 285 U. S. 543; *United States v. Miro*, *supra*; *United States v. Commerford*, 64 F. 2d 28 (C. C. A. 2d), certiorari denied, 289 U. S. 759; *Hargrove v. United States*, 67 F. 2d 820 (C. C. A. 5th); *Bowles v. United States*, 73 F. 2d 772 (C. C. A. 4th), certiorari denied, 294 U. S. 710; *Kitrell v. United States*, 76 F. 2d 333 (C. C. A. 10th); *United States v. Capone*, 93 F. 2d 840 (C. C. A. 7th), certiorari denied, 303 U. S. 651.\* Of all of the judges who have considered the point only two,

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\* The prosecution of Alphonse Capone involved the tax years 1925 to 1929, inclusive. He filed no return for any of those years. For the years 1928 and 1929 he was prosecuted on both felony and misdemeanor charges. As to the other years he was indicted only on felony charges. On his first appeal he did not raise the present issue, apparently because of the then recent decision in the same circuit in the *O'Brien* case, *supra*. See *Capone v. United States*, 56 F. 2d 927 (C. C. A. 7th), certiorari denied, 286 U. S. 553. At a much later time, he raised the issue on an application for vacation of a part of the sentence imposed. The issue was presented under the contention that the verdict was inconsistent. The application was denied by the District Court and the judgment was affirmed by the Circuit Court of Appeals in the decision cited in the text.



Judge Alschuler in the *O'Brien* case and Judge L. Hand below, have expressed an opinion to the contrary. On the basis of these decisions, between 1930 and 1942 the Department of Justice has instituted criminal proceedings under Section 145 (b), or corresponding sections, where no return had been filed, which have resulted in felony indictments and convictions in 83 cases.\* During the period in which these decisions and this administrative practice have remained in effect Section 145 (b) has been many times reenacted in identical language. The publicity given a number of these cases makes reasonable the assumption that Congress was aware of this administrative practice when re-enacting the statute.

To overcome this long established line of decisions and to exclude from the statute a course of

\*A summary of the character of the defendants involved and of the results of these criminal proceedings instituted, in the period between 1930 and 1942, as revealed by the files of the Department, is as follows:

Persons Indicted	Aggregate Tax Years involved	Convictions by Verdict	Convictions by Pleas of Guilty	Convictions by Pleas of nolo contendere	Aggregate Years of Imprisonment Imposed	Aggregate Fines Imposed	Number of Defendants Engaged in Illegal Business or Conduct
83	285	19	54	10	79	\$148,084	45

In addition to the prosecution of Alphonse Capone the Department of Justice prosecuted in the year 1934 the notorious Arthur Flegenheimer, alias "Dutch" Schultz, on charges of willfully attempting to defeat and evade income taxes for the years 1929, 1930, and 1931, by failure to file returns for those years. However, the defendant was acquitted by the verdict of the jury.

conduct included within the ordinary meaning of its language, only two reasons have been suggested. The first is that of Judge Alschuler in the *O'Brien* case. The second was that unsuccessfully presented in the *Miro* case and emphasized by the petitioner here.

1. Judge Alschuler in the *O'Brien* case argued that if Section 145 (b) be interpreted in the manner upheld by the majority of his court it created an offense having identical elements as to intent and conduct with the misdemeanor defined in Section 145 (a) of the Act; that Section 145 (a) was specific while Section 145 (b) was in general terms and, hence, that Section 145 (b) must be interpreted in a manner to exclude the specific crime defined in Section 145 (a).<sup>\*</sup> We believe,

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<sup>\*</sup>The further argument of Judge Alschuler based on a statement of this Court in *United States v. Novack*, 273 U. S. 202, 206, is inconclusive as to the problem here. This statement in the *Novack* decision was made by way of illustration and is to the effect that the making of a false return, without presentation thereof, does not constitute an attempt to evade the tax.<sup>\*</sup> Taken in its context this statement plainly refers to an attempt to evade by means of the filing of a false return, which cannot in itself constitute an offense until the false return is filed. Thus the statement was contrasted with the crime of making a false affidavit, which is completed on the execution of the return. In making the statement the Court does not appear to have considered the situation presented by a failure to comply with the statutory duty of filing a return. This interpretation of the statement is made more certain by the fact that the Court was there dealing with an earlier statute in which the willful failure to file a return and the attempt to evade were combined in a single section with an identical punishment.

however, that the very premise of this argument is fallacious. Section 145 (a) provides in part that any person required to make a return "who willfully fails to \* \* \* make such return \* \* \* at the time or times required by law" shall be guilty of a misdemeanor. The physical element common to this crime and to the interpretation of Section 145 (b) as expressed in the charge of the trial court below is the failure to file a return.\* This without more is not an offense under either section. Other circumstances must be added, and the circumstances under each section are different. Thus, apart from the requisite intent, to constitute the offense under Section 145 (a) there must be shown a statutory duty to file a return (arising in the commonest instance from the receipt of a specified amount of gross income) and a failure to file the return. (Revenue Act of 1936, Sec. 51.) Again, apart from intent, to constitute the crime under Section 145 (b) there must be shown these same elements but in addition there must be established an unre-

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The instant problem arose with its present force only with the later separation of the offenses and the gradation of the punishments. Moreover, whatever the meaning of this single sentence in the *Noveck* case, the decision itself and its rationale lend most powerful support to our contention here.

\* Even this similarity is qualified. The crime under Section 145 (a) is failure to file on time. Under Section 145 (b) as interpreted below the crime requires a failure to file at all.

ported net income and a tax due and unpaid. This in turn requires reference to all of the provisions and factors relating to exemptions, deductions and credits. From the standpoint of physical elements, therefore, the offenses are not identical but rather the central element of each crime is distinct. Section 145 (b) may include the elements of Section 145 (a) but its violation arises only with the existence of additional factors.

Similarly, we believe that Judge Alschuler is incorrect in his assumption that the requisite intent under both sections is the same. Whatever else the statutory word "willfully" may include, at the very least in this setting it requires knowledge of the elements of the crime. Thus under Section 145 (a) it need only be shown that the defendant knew of his receipt of *gross* income in an amount sufficient to require his filing of a return. Under Section 145 (b) it must be shown that the defendant knew of his receipt of *net* income on which a tax was due. Further, although the word "willfully" may admit of a general definition applicable to each section (*cf. United States v. Murdock*, 290 U. S. 389), in practice the infinite variety of motivation which may impel the human mind will yield a sharp differentiation between the two offenses. The Government's experience in enforcing these criminal provisions has demonstrated that the willful failure to file a return or pay a tax, even when a tax is clearly due, is not necessarily

motivated by a desire to evade the tax. For the information of the Court we cite a few of the examples which are contained in the files of the Department of Justice:

A taxpayer who had developed a personal antagonism to the local taxing officials refused because of this prejudice to file a return; a taxpayer, proclaiming himself a leader of a tax revolt, refused to file a return until there had been a change of the national administration; a taxpayer with strong pacifist tendencies refused to pay a tax which in any part would be devoted to the prosecution of the war.

These persons all deliberately and wilfully violated the duty imposed upon them under the Revenue Acts and hence were clearly guilty of the misdemeanors specified in Section 145 (a). But it was equally clear that whatever their motivation, their conduct was not designed to defeat or evade a tax. Accordingly the felony provisions of Section 145 (b) could have no application to their respective cases. It is reasonable to suppose that Congress had such cases in mind in providing more drastic punishment for the willful crime of evading a tax than for the obstinate refusal for other purposes to comply with the administrative provisions of the Act. Judge Alschuler was thus in error in concluding that Section 145 (a) requires an intent to defraud the Government. Cf. *United States v. Murdock, supra*.



Moreover, apart from the constituent elements of the offenses under the two sections, they differ in their very essence and exist for separate purposes. The essence of the crime under Section 145 (b) is the endeavor to defraud the Government of a tax due. See *Emmich v. United States*, 298 Fed. 5, 9 (C. C. A. 6th), certiorari denied, 266 U. S. 608. The filing of a false return, the failure to file any return, the concealment of sources of income or any one of the variety of possible methods of attempting to evade are simply means to the end, not the end itself. Thus, as we have emphasized, Section 145 (b) expressly provides that the attempted evasion may be "in any manner." On the other hand, the essence under Section 145 (a) is the mere failure to comply with the statutory duty to file a return at the specified time. Hence this section speaks of a failure to file "at the time or times required by law or regulations." Under it, a stubborn taxpayer who conceived that the denial of a requested extension of time within which to file a return was unjust and who willfully filed his return late would be guilty of a misdemeanor; he clearly would not be guilty of a felony under Section 145 (b). Thus, the purpose of Section 145 (a) is to secure the enforcement of the administrative provisions of the income tax laws, whereas, the purpose of Section 145 (b) is to secure the enforcement of the substantive provisions of those laws.



Finally, a comparison of the legislative histories of Sections 145 (a) and 145 (b) demonstrates that the two provisions have developed side by side but in entirely different fashion and have always been regarded by Congress as distinctive provisions having separate purposes.<sup>10</sup> The parallel

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<sup>10</sup> We have previously described the development of Section 145 (b), *supra*, pp. 23-24. The original form of Section 145 (a) as it appeared in Section 38 Eighth of the 1909 Act and in Section II F of the 1913 Act was a mere money penalty for the taxpayer who "shall refuse or neglect to make a return at the time or times hereinbefore specified". Section 18 of the 1916 Act and Section 1209 of the Act of October 3, 1917, continued the provision in substantially identical form; the 1917 Act, however, made the provision applicable to the payment of tax and the supplying of required information. In the 1918 Act the provision was considerably altered. In Section 1308 (a) of that Act a money penalty was made applicable to the person "who fails to pay, collect, or truly account for any pay over any such tax, make any such return, or supply any such information at the time or times required by law or regulation". Section 1308 (b) added a provision making any person guilty of a misdemeanor "who willfully refuses to" perform the various duties specified in sub-section (a). See citations to legislative materials, *supra*, footnote 4, p. 24. Sections 1302 (a) and (b) of the 1921 Act made no changes in the corresponding sections of the 1918 Act. As with Section 145 (b) the modern form of Section 145 (a) first appeared in the 1924 Act as Section 1017 (a). In this act the money penalty for a failure to file a return, etc., without a willful intent was dropped entirely from the statute. The misdemeanor provision for willful neglect to perform the various statutory duties was changed from "willfully refuses" to "willfully fails." See citation to legislative materials, *supra*, footnote, p. 24; see also Cong. Record, Vol. 65, Part 7, pp. 7143-7145.

development of the sections thus negatives the suggestion that Section 145 (a) was intended to, or does, limit in any way the scope and broad language of Section 145 (b). Plainly, the provision for willful failure to file as first enacted in Section 1017 (a) of the 1924 Act was simply a combination of the prior provisions for a failure to file without willfulness and a willful refusal and was not a provision carved out of the already existing offense of a willful attempt to evade. Instead, the latter provision, now 145 (b), was at the same time not only re-enacted in Section 1017 (b) but was expanded, *supra*, footnote, p. 24.

It follows, therefore, that the offenses under each section differ in their constituent elements, in the essence of the offense and in the purpose of the provision. An interpretation of Section 145 (b) to include an attempt to evade by means of a failure to file a return thus does not coincide with the express provisions of Section 145 (a) and no limitation on the general language of Section 145 (b) is required. The jury here was not left in doubt as to the distinction between the two sections for the petitioner himself requested and the judge carefully charged the jury, both in his own language and in the language of the requests, that the defendant was not charged with a willful failure to file a return or to pay a tax and could not be found guilty of those offenses but that the only crime of which he might be found guilty was a

willful attempt to evade the income tax. (R. 392-393, 403, 407.) The charge defined the offense under Section 145 (b) and only that offense. (R. 397, 401-406.)"

2. The second reason suggested for limitation of Section 145 (b), which was unsuccessfully advanced in the *Miro* case and is emphasized by the petitioner here, is that the word "attempts" in Section 145 (b) must be interpreted in accordance with the word of art "attempts" at common law and hence to constitute an offense must require some affirmative action toward completion of the intended crime. The requirement of affirmative action by the common law, however, arose from the undesirability of punishment simply for an evil mind. See Holmes, *The Common Law* (1881) 65-70, Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 Yale L. J: 789-831 (1940). Only if some action were taken was the peace actively endangered or harm to person or

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"The substance of this discussion is equally applicable to the petitioner's further contention that the charge here is simply a combination of the two misdemeanors under Section 145 (a) of a willful failure to file a return and a willful failure to pay a tax. They demonstrate that the offense charged is not a mere combination but a distinct entity. However this may be, even a combination normally has characteristics other than the mere total of those of its constituent parts. There is no incongruity in defining as a greater crime the simultaneous commission of two lesser crimes; consider, for example, the crime of murder resulting from homicide in the course of the commission of a felony.

property threatened. Further, only then was it possible to prove intent from physical circumstances. The common law crimes were primarily crimes of action and few, if any, affirmative duties with criminal consequences rested on the citizen.

Under Section 145 (b) the situation is entirely reversed. The Revenue Acts impose on the taxpayer an affirmative duty to act by filing a return. His failure to perform this duty is a physical fact, not merely a state of mind, and at once endangers the public revenue. His conduct is susceptible of physical proof and permits a showing of his intent to evade the tax. None of the reasons, therefore, which may have led to the rule of common law attempts is applicable to the modern statutory crime of attempted tax evasion. No factor in the history or purpose of the legislation requires an incorporation into the statute of the complexities of common law attempts. Rather, the purpose, practical application and ordinary meaning of the statute all oppose such incorporation. Cf. Arnold, *Criminal Attempts—The Rise and Fall of An Abstraction*, 40 Yale L. J. 53 (1930).

Moreover, it does not follow that an incorporation of modern principles of common law attempts into Section 145 (b) would require the exclusion from the statute of an attempt to evade by means of a failure to file a return. In the presence of an affirmative duty to act which is performed by other taxpayers, conduct such as that of the peti-

tioner in failing to act becomes in a very real sense positive physical action capable of being visually discerned. Modern analyses of the subject of criminal attempts measure the extent to which affirmative action must proceed to result in an offense, in terms of the objective social harms inherent in the defendant's conduct as considered in the light of all of the circumstances surrounding that conduct. Hall, *supra*, pp. 812-840; Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821, 837-859 (1928). The conduct here in question meets all of the requirements of objective social harm and indeed creates the maximum social harm proscribed by the revenue laws. A reversal of this conviction, therefore, would require not only an incorporation of the rules of common law attempts into Section 145 (b) but a distortion of the principles underlying the common law rules as well. Cf. Kirchheimer, *Criminal Omissions*, 55 Harv. L. Rev. 615 (1942), especially pp. 619-620, 636, 638-639.

In view of the anomaly in the practical application of the statute which we have previously described as resulting from the petitioner's interpretation of Section 145 (b), we may properly ask in testing the petitioner's argument how the section must be drafted to include conduct of the character here in question. The section could not be phrased in terms of a completed evasion since under the statute of limitations applicable to the civil tax

liability the tax may be collected however late the evasion be discovered.<sup>12</sup> The mere discovery of the attempt thus tends to prevent its becoming a completed evasion. Again, the crime of attempted evasion must be stated in general terms since the possible means of evasion are myriad, and Congress could not, with safety, undertake to catalog all possible means of evasion. Would the section then be phrased "who willfully attempts in any manner, including a failure to file a return as required by law or regulations made under authority thereof, to evade or defeat any tax"? But if the present phrase "in any manner" has any meaning, it must mean precisely what it says and include any possible specific means. The literary futility of any satisfactory amendment demonstrates the all-inclusive character of the present statute.

The petitioner's further contention that the statute as interpreted below is invalid for uncertainty is without substance. This Court has recently considered such a contention in circumstances even more abstruse for a layman and has concluded that the standards of the statute are of sufficient definiteness. *United States v. Ragen*, 314 U. S. 513. In so far as the general problem here

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<sup>12</sup> Section 276 (a) of the Internal Revenue Code provides as follows:

*False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.



raised is concerned, the statute is plain to the lay mind. The interpretation of the statute to include the petitioner's conduct is of long standing and any indefiniteness results only from the petitioner's endeavor to incorporate the common law complexities into the statute. The prospective evader might then rightly ask himself, if he planned to file no return, what affirmative acts would carry him from a misdemeanor to a felony. Only an investigation of the library of technical writings on the subject of common law attempts could even suggest an answer to his question. Further, Section 145 (b) is not invalid as interpreted below in that it may apply to a fact situation to which Section 145 (a) is also applicable. Section 145 (b) contains additional elements which are sufficient to form the basis for a separate offense. *Albrecht v. United States*, 273 U. S. 1; *United States v. Noveck*, 273 U. S. 202, *supra*; *O'Brien v. United States*, *supra*.

b. Contrary to the petitioner's contention, the evidence here was sufficient to support the conviction under any interpretation of Section 145 (b). Neither the common law of attempts nor the suggested interpretation of the section in the dissent in the *O'Brien* case would require any specific affirmative act for the offense. Any effort toward completion of the crime which substantially endangers the revenue would be sufficient. *Cf.* *Holmes*, *supra*, pp. 68-70. The record in this case discloses that the petitioner did take affirmative

action to conceal his receipt of income. He insisted on and secured the payment in cash of an obligation normally paid by check. (R. 16-19, 21-22, 69-71.) He deposited the cash not in his own bank account but in the account of his wife. (R. 71, 88, 105, 143.) He shortly thereafter withdrew the bulk of the money from this account and deposited portions of it in several other accounts in the names of members of his family, including two accounts opened with these deposits. (R. 88-91, 143-144.) Finally, within another short interval, a major part of the money was withdrawn from various of the accounts and used to purchase a life insurance company annuity. (R. 89-90, 144.) In his defense he contended that these were not acts of concealment but resulted from motives of innocence. (R. 143-144, 159-161.) The acts, however, resulted in concealment, whatever the degree thereof, and were subject to the interpretation that they were intended for the purpose of concealment. The verdict of the jury makes proper at this time a conclusion that the acts were acts of concealment. Particularly is this true since the trial court directly charged that these acts might be considered by the jury in testing the petitioner's intent. (R. 405.) The concealment resulting from these acts continued in effect without correction at the time the tax obligation arose. From its inception it presented a danger to the revenue, a danger which

gathered in force as the events fixing the tax liability transpired.<sup>12</sup>

Similarly, the circumstances surrounding the petitioner's conduct as revealed by the evidence justified the jury's conclusion that the petitioner intended not merely to fail in his duty to file a return but to evade the tax due on his unreported income. The evidence thus does not merely prove a willful failure to file a return or to pay a tax; it establishes a willful attempt to evade the tax.

c. As with the proof, the indictment here was sufficient whatever the interpretation of Section 145. (b). The indictment alleged a complete charge in statutory terms. This was sufficient without the alleging of any means of evasion whatever. *Capone v. United States*, 56 F. 2d 927 (C. C. A. 7th), certiorari denied, 286 U. S. 553, *supra*; see also *United States v. Scharton*, 285 U. S. 518, 521; *cf. United States v. Simmons*, 96 U. S. 360; *Durland v. United States*, 161 U. S. 306, 314-315; *United States v. Gooding*, 12 Wheat. 460, 473-475; *People v. Bush*, 4 Hill (N. Y.) 133.

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<sup>12</sup> We believe this argument disposes of any problems of the correlation of times and the application of the statute of limitations. Again, however, we submit that the very necessity of treating these additional problems created by the petitioner's interpretation of Section 145 (b) illustrates the unsoundness of his general contention. Only if the section is interpreted to include an attempt to evade by means of a failure to file a return does it become a simple, cohesive provision capable of carrying out its broad terms.

As shown by the *Capone* case, *supra*, the allegations of the means of commission of the offense therefore clearly are "surplusage" in the indictment, and are not necessary to constitute a valid indictment. *Crapo v. United States*, 100 F. 2d 996, 998 (C. C. A. 10th), involved a prosecution of the defendants for unlawfully having in possession a sawed-off shotgun, transferred in violation of statute "in that they had failed to pay the tax of \$200 on such firearm, to secure stamps showing the payment of such tax," and to affix stamps and furnish a written order for that purpose. The court held, as it stated (p. 1001):

That portion of count 2 which charged Crapo with the failure to pay the tax and to affix the appropriate stamps to the order may be disregarded as surplusage. \* \* \*

See also *Farley v. United States*, 269 Fed. 721, 724 (C. C. A. 9th). It is well established, of course, that an indictment containing unnecessary allegations must be sustained, if legally sufficient, unless prejudicial to the defendant. *Smith v. United States*, 17 F. 2d 723 (C. C. A. 8th), certiorari denied, 274 U. S. 762. Thus, in the instant case the allegation of failure to file a return or pay any tax may be considered as surplusage to the charge of attempted tax evasion, and the indictment was without error or imperfection. If any imperfection did exist it was as to form only, and the case falls within the purview of Section 1025 of the

Revised Statutes, which directs that "No indictment \* \* \* shall be deemed insufficient \* \* \* by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." *Dunbar v. United States*, 156 U. S. 185, 191; *Breese v. United States*, 226 U. S. 1, 11.

## II

### THE TRIAL COURT FULLY AND CORRECTLY INSTRUCTED THE JURY REGARDING THE ELEMENT OF WILL- FULNESS

With respect to petitioner's further contention that the trial court erred in failing to give certain requested instructions in connection with the element of willfulness (Br. 15), as shown by the Statement, *supra*, pp. 13, 14, the trial court fully, fairly, and correctly instructed the jury in this respect. See *United States v. Murdock*, 290 U. S. 389. Apparently referring to requested instructions Nos. 21, 22, 23 and 24 (R. 394), the petitioner is in error in suggesting and stating that the trial court failed to give these instructions or any instructions at all upon the subject. See Statement, *supra*, pp. 13, 14; see also R. 401. The instructions requested by petitioner were equivalent to a direction that if the jury found that the petitioner's physical condition was as alleged, the jury must find that petitioner's omissions were not willful and that petitioner was not guilty. The

question of willfulness is a jury question (*United States v. Murdock, supra*, p. 396) and petitioner was not entitled to have the court instruct the jury as to what weight the jury must give to particular items of evidence. The court properly refused to single out and overemphasize such expert medical testimony. *Perovich v. United States*, 205 U. S. 86, 92.

#### CONCLUSION

The judgment of the court below is correct and should be affirmed.

Respectfully submitted,

✓ CHARLES FAHY,  
Solicitor General.

✓ SAMUEL O. CLARK, Jr.,  
Assistant Attorney General.

✓ SEWALL KEY,  
GERALD L. WALLACE,  
✓ EARL C. CROUTE, ✓  
ROBERT R. BARRETT,

*Special Assistants to the Attorney General.*

DECEMBER, 1942.



## APPENDIX A

Revenue Act of 1924, c. 234, 43 Stat. 253:

### SEC. 1017. \* \* \*

(b) Any person required under this Act to collect, account for and pay over any tax imposed by this Act, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this Act or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) Any person who willfully (1) aids or assists in the preparation or presentation of a false or fraudulent return, affidavit, claim, or document, authorized or required by the internal revenue laws, or (2) procures, counsels, or advises the preparation or presentation of such return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

**SEC. 51. INDIVIDUAL RETURNS.**

(a) *Requirement.*—The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title and such other information for the purpose of carrying out the provisions of this title as the Commissioner with the approval of the Secretary may by regulations prescribe—

(1) Every individual having a net income for the taxable year of \$1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of \$2,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of \$5,000 or over, regardless of the amount of his net income.

(b) *Husband and wife.*—If a husband and wife living together have an aggregate net income for the taxable year of \$2,500 or over, or an aggregate gross income for such year of \$5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

\* \* \* \*

**SEC. 145. PENALTIES.**

(a) Any person required under this title to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such rec-

ords, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

**Revised Statutes, as amended:**

SEC. 1025. No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, \* \* \*  
(U. S. C., Title 18, Sec. 556.)

## APPENDIX B

H. Conference Rep. No. 844, 68th Cong., 1st Sess., p. 32 (1939-1 Cum. Bull. (Part 2) 300):

Amendment No. 242: The Senate amendment provides a complete system of penalties in lieu of those contained in section 1017 of the House bill. Subdivisions (a) and (b) correspond to subdivision (a) of this section of the House bill with the following changes: The penalty provided in subdivision (a) of the Senate amendment applies to a wilful failure to comply with the requirements of the law therein set forth; in the House bill the penalty applied to a wilful refusal. Wilful failure to collect, account for, and pay over any tax imposed by the act, or a wilful attempt to evade such tax, is made a felony with a fine of not over \$10,000 and imprisonment for not over five years or both, instead of a misdemeanor as in the House bill. A wilful attempt to defeat the tax or the payment thereof has been added to the list of offenses specified in subdivision (b). Subdivision (c), which was not contained in the House bill, provides a penalty for the offense of aiding in the preparation, presentation, procurement, counseling, or advising of a false or fraudulent return, affidavit, claim, or document authorized or required by the internal revenue laws. The House recedes.

# SUPREME COURT OF THE UNITED STATES.

No. 278.—OCTOBER TERM, 1942.

Murray R. Spies, Petitioner,  
vs.  
The United States of America.

On Writ of Certiorari to  
the United States Circuit  
Court of Appeals for the  
Second Circuit.

[January 11, 1943.]

Mr. Justice JACKSON delivered the opinion of the Court.

Petitioner has been convicted of attempting to defeat and evade income tax in violation of § 145(b) of the Revenue Act of 1936, 49 Stat. 1648, 1703, now § 145(b) of the Internal Revenue Code. The Circuit Court of Appeals found the assignment of error directed to the charge to the jury the only one of importance enough to notice. The charge followed the interpretation put upon this section of the statute in *O'Brien v. United States*, 51 F. 2d 193 (C. C. A. 7), and *United States v. Miro*, 60 F. 2d 58 (C. C. A. 2), which followed it. The Circuit Court of Appeals affirmed, stating that "we must continue so to construe the section until the Supreme Court decides otherwise." 128 F. 2d 743. One Judge said that as a new matter he would decide otherwise and expressed approval of the dissent in the *O'Brien* case. As the construction of the section raises an important question of federal law not passed on by this Court; we granted certiorari. — U. S. —

Petitioner admitted at the opening of the trial that he had sufficient income during the year in question to place him under a statutory duty to file a return and to pay a tax, and that he failed to do either. The evidence during nearly two weeks of trial was directed principally toward establishing the exact amount of the tax and the manner of receiving and handling income and accounting, which the Government contends shows an intent to evade and defeat tax. Petitioner's testimony related to his good character, his physical illness at the time the return became due, and lack of willfulness in his defaults, chiefly because of a psychological disturbance, amounting to something more than worry but something less than insanity.



Section 145(a) makes, among other things, willful failure to pay a tax or make a return by one having petitioner's income at the time or times required by law a misdemeanor.<sup>1</sup> Section 145(b) makes a willful attempt in any manner to evade or defeat any tax such as his a felony.<sup>2</sup> Petitioner was not indicted for either misdemeanor. The indictment contained a single count setting forth the felony charge of willfully attempting to defeat and evade the tax, and recited willful failure to file a return and willful failure to pay the tax as the means to the felonious end.

The petitioner requested an instruction that "You may not find the defendant guilty of a willful attempt to defeat and evade the income tax, if you find only that he had willfully failed to make a return of taxable income and has willfully failed to pay the tax on that income." This was refused, and the Court charged that "If you find that the defendant had a net income for 1936 upon which some income tax was due, and I believe that is conceded, if you find that the defendant willfully failed to file an income tax return for that year, if you find that the defendant willfully failed to pay the tax due on his income for that year, you may, if you find that the facts and circumstances warrant it find that the defendant willfully attempted to evade or defeat the tax." The Court refused a request to instruct that an affirmative act was necessary to constitute a willful attempt and charged that "Attempt means to try to do or accomplish. In order to find an attempt it is not necessary to find affirmative steps to accomplish the prohibited purpose. An attempt may be found on the basis of inactivity or on refraining to act, as well."

It is the Government's contention that a willful failure to file a return together with a willful failure to pay the tax may, with-

1 "Any person required under this title to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

2 "Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."



out more, constitute an attempt to defeat or evade a tax within § 145(b). Petitioner claims that such proof establishes only two misdemeanors under § 145(a) and that it takes more than the sum of two such misdemeanors to make the felony under § 145(b). The legislative history of the section contains nothing helpful on the question here at issue, and we must find the answer from the section itself and its context in the revenue laws.

The United States has relied for the collection of its income tax largely upon the taxpayer's own disclosures rather than upon a system of withholding the tax from him by those from whom income may be received. This system can function successfully only if those within and near taxable income keep and render true accounts. In many ways taxpayers' neglect or deceit may prejudice the orderly and punctual administration of the system as well as the revenues themselves. Congress has imposed a variety of sanctions for the protection of the system and the revenues. The relation of the offense of which this petitioner has been convicted to other and lesser revenue offenses appears more clearly from its position in this structure of sanctions.

The penalties imposed by Congress to enforce the tax laws embrace both civil and criminal sanctions. The former consist of additions to the tax upon determinations of fact made by an administrative agency and with no burden on the Government to prove its case beyond a reasonable doubt. The latter consist of penal offenses enforced by the criminal process in the familiar manner. Invocation of one does not exclude resort to the other. *Helvering v. Mitchell*, 303 U. S. 391.

The failure in a duty to make a timely return, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, is punishable by an addition to the tax of 5 to 25 per cent thereof, depending on the duration of the default. § 291 of the Revenue Act of 1936 and of the Internal Revenue Code. But a duty may exist even when there is no tax liability to serve as a base for application of a percentage delinquency penalty; the default may relate to matters not identifiable with tax for a particular period; and the offense may be more grievous than a case for civil penalty. Hence the willful failure to make a return, keep records, or supply information when required, is made a misdemeanor, without regard to existence of a tax liability. § 145(a). Punctuality is important to the fiscal system, and these are sanc-

tions to assure punctual as well as faithful performance of these duties.

Sanctions to insure payment of the tax are even more varied to meet the variety of causes of default. It is the right as well as the interest of the taxpayer to limit his admission of liability to the amount he actually owes. But the law is complicated, accounting treatment of various items raises problems of great complexity, and innocent errors are numerous, as appear from the number who make overpayments.<sup>3</sup> It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay. §§ 292 and 294 of the Revenue Act of 1936 and of the Internal Revenue Code. If any part of the deficiency is due to negligence or intentional disregard of rules and regulations, but without intent to defraud, five per cent of such deficiency is added thereto; and if any part of any deficiency is due to fraud with intent to evade tax, the addition is 50 per cent thereof. § 293 of the Revenue Act of 1936 and of the Internal Revenue Code. Willful failure to pay the tax when due is punishable as a misdemeanor. § 145(a). The climax of this variety of sanctions is the serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat the tax. § 145(b). The question here is whether there is a distinction between the acts necessary to make out the felony and those which may make out the misdemeanor.

A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony may include one or several of the other offenses against the revenue laws. But it would be unusual and we would not readily assume that Congress by the felony defined in § 145(b) meant no more than the same derelictions it had just defined in § 145(a) as a misdemeanor. Such an interpretation becomes even more difficult to accept when we consider

<sup>3</sup>The following statistics are given by the Commissioner of Internal Revenue for the fiscal year 1941: 73,627 certificates of overassessment of income tax issued, for 39,730 of which no claims had been filed; 236,610 assessments of additional income taxes made; 871 investigations made of alleged evasion of income and miscellaneous taxes, with recommendation for prosecution in 239 cases involving 446 individuals, of whom 192 were tried and 156 convicted. The total number of income tax returns filed was 16,052,007, of which number 7,867,319 reported a tax. Annual Report of the Commissioner of Internal Revenue (1941), pp. 17, 20, 21, 22, 52, 108.

this felony as the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.

The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States v. Murdock*, 290 U. S. 389. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax where there had been no willful failure to disclose the liability is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.

Had §145(a) not included willful failure to pay a tax, it would have defined as misdemeanors generally a failure to observe statutory duties to make timely returns, keep records, or supply information—duties imposed to facilitate administration of the Act even if, because of insufficient net income, there were no duty to pay a tax. It would then be a permissible and perhaps an appropriate construction of § 145(b) that it made felonies of the same willful omissions when there was the added element of duty to pay a tax. The definition of such nonpayment as a misdemeanor we think argues strongly against such an interpretation.

The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term "attempt," as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common-law "attempt."<sup>4</sup> The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impos-

<sup>4</sup> Holmes, *The Common Law*, pp. 65-70; Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 *Yale Law Journal* 789; Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 *Yale Law Journal* 53.

sibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeed in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner". By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.

In this case there are several items of evidence apart from the default in filing the return and paying the tax which the Government claims will support an inference of willful attempt to evade or defeat the tax. These go to establish that petitioner insisted that certain income be paid to him in cash, transferred it to his own bank by armored car, deposited it, not in his own name but in the names of others of his family, and kept inadequate and misleading records. Petitioner claims other motives animated him in these matters. We intimate no opinion. Such inferences are for the jury. If on proper submission the jury found these acts, taken together with willful failure to file a return and willful failure to

pay the tax, to constitute a willful attempt to defeat and evade tax, we would consider conviction of a felony sustainable. But we think a defendant is entitled to a charge which will point out the necessity for such an inference of willful attempt to defeat or evade tax from some proof in the case other than that necessary to make out the misdemeanors; and if the evidence fails to afford such an inference, the defendant should be acquitted.

The Government argues against this construction, contending that the milder punishment of a misdemeanor and the benefits of a short statute of limitation should not be extended to violators of the income tax laws such as political grafters, gamblers, racketeers, and gangsters. We doubt that this construction will handicap prosecution for felony of such flagrant violators. Few of them, we think, in their efforts to escape tax stop with mere omission of the duties put upon them by the statute, but if such there be, they are entitled to be convicted only of the offense which they have committed.

*Reversed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*